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## COUNTY HOME RULE — SHARING THE STATE'S LEGISLATIVE POWER WITH MARYLAND COUNTIES

By M. PETER MOSER\*

Today, more than ever before, state and local governments are in need of modernization. It has become increasingly apparent that these governments can no longer cope effectively with the complex problems created by our rapidly expanding population and increasing standard of living. The private citizen sees outward manifestations of the inadequacy of local government when a county government cannot provide his area with water, sewage disposal or some other needed service because it lacks the legal power; or where some desired change in the structure of a local government requires amendment of the state constitution, and the amendment is defeated by voters living outside the locality. The private citizen, however, usually fails to identify the real causes of this governmental impotence. One of the primary causes is that the legal framework within which state and local governments must operate impedes effective modern government because it is the product of a bygone era.<sup>1</sup> State constitutions generally fail to adequately define the authority of state and local officials or to place the responsibility for action in specific elected officials whom the citizen can identify. This is particularly true in Maryland, where the responsibility for county government is split between the county officials and the state legislature.<sup>2</sup>

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1. There are, of course, many other reasons for the inadequacies of local governments that are beyond the scope of this study. For instance, one of the major reasons for these inadequacies is that heavily urbanized areas, particularly the larger cities, cannot provide necessary services because their financial resources are insufficient. Poor administrative organization is another reason. In large urban areas, greater decentralization of the provision of services is needed. A third reason for the inadequacies is a lack of coordination among units of local government to deal on a regional basis with common problems crossing their boundaries. It takes far too long to establish on a cooperative basis such joint facilities as waste disposal plants, water and sewer systems, jails, mass transit systems and the like. Broad shared powers for counties, which this study analyzes and advocates, would not insulate counties from state control to such an extent that the General Assembly could not regulate matters transcending county boundaries where intercounty cooperative efforts fail.

2. The present Maryland Constitution places excessive control over the counties in the hands of the General Assembly. This is done partly through constitutional provisions affirming legislative control over some county officers. *E.g.*, Md. CONST.

It is no longer possible to accept the outworn dogma that the best government is that which governs least. Pressure for local governmental services is so great that when a state or local unit fails to provide necessary services, the federal government often fills the gap by providing these services. Those who advocate the "least government" theory on the state and county level overlook the fact that federal programs often tend to be less responsive to the desires of the local citizens than programs initiated and controlled by state and local governments. If this view prevails, the imbalance created by ever-increasing federal control of new or expanded local services may eventually eliminate states and counties as effective units of government.<sup>3</sup> In order to offset

art. VII, § 1. But the main source of legislative control is through the enactment of local legislation by the General Assembly, restrictions upon which are probably less stringent in Maryland than in any other state. See C. EVERSTINE, *LOCAL GOVERNMENT: A COMPARATIVE STUDY* 54 (Leg. Council of Md., Research Rep. No. 23, 1944); COMMISSION ON ADMINISTRATIVE ORGANIZATION, *LOCAL LEGISLATION IN MARYLAND* 1 (2d rep., 1952). One reason why the Maryland General Assembly enacts so much local legislation is that the counties are not granted sufficient powers to enact these laws themselves. The resultant split of authority for local programs between the state legislature and the local government makes it difficult for the private citizen to determine if the county government or the local legislative delegation is responsible for inaction on needed local programs.

3. The Research and Policy Committee of the Committee for Economic Development says:

For many years, however, states and their local units of government have not been performing as effectively as they should. State and local governments are for the most part poorly equipped to cope with the problems of the last third of the twentieth century. In too many cases they are trying to serve an urban industrial society with a system developed for an agrarian society. Since 1930 demands for improved public services have accelerated beyond the apparent capacity and will of state and local governments to provide them effectively. As a result, the tendency has been for the national government, with its superior revenue resources, to assume more and more responsibility.

The gap between state performance and responsibility could widen during the next decade as state and local governments grapple with increasing demands for better education, better housing, better transportation, and less air and water pollution. If states are to perform more effectively they must strengthen their capacity, and that of local governments, to raise the revenues needed to meet these demands. At the same time states must take steps to modernize their local governments.

RESEARCH AND POLICY COMMITTEE, COMMITTEE FOR ECONOMIC DEVELOPMENT, *A FISCAL PROGRAM FOR A BALANCED FEDERALISM* 9 (1967). See also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL AND PERSONNEL POWERS OF LOCAL GOVERNMENT* (1962); NATIONAL MUNICIPAL LEAGUE, *MODEL STATE CONSTITUTION* 94-100, 103-04 (6th ed., 1963); J. WHEELER, *SALIENT ISSUES OF CONSTITUTIONAL REVISION* 143-46, 150-62 (National Municipal League, 1961); REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION OF MARYLAND 241-66, 283 (1967); RESEARCH AND POLICY COMMITTEE, COMMITTEE FOR ECONOMIC DEVELOPMENT, *MODERNIZING LOCAL GOVERNMENT* (1966); RESEARCH AND POLICY COMMITTEE, COMMITTEE FOR ECONOMIC DEVELOPMENT, *MODERNIZING STATE GOVERNMENT* (1967); SANFORD, *STORM OVER THE STATES* 17-38 (1968); Unruh, *Taking the Initiative*, 57 NAT'L CIV. REV. 407 (1968). Those who believe otherwise argue that detailed state constitutional restrictions on state and local governmental action are necessary to preserve the liberties of the people. See, e.g., Barnes, *Mail Order Constitutions — The Twilight of the States?*, DAR MAGAZINE, Feb., 1968. Stronger state and local governments are needed, but the federal government should not be weakened. See Grodzins, *Why Decentralization by Order Won't Work*, in BANFIELD, *URBAN GOVERNMENT* 122-31 (1961). The trend toward the provision of more services by the federal government does not result from the state and local governments reducing the services which they perform. In fact, the provision of services at the state and local levels also has increased. The imbalance is relative and results from the more rapid expansion of services provided at the federal level. See ANDERSON, *THE NATION AND THE STATES* 139-50 (1955). For an excellent current analysis of appropriate goals of state consti-

the centripetal force of increasingly stronger federal government and maintain our system as a truly "federal" one, state governments must be modernized and local governments given broad home rule powers to solve problems at the local level.

There are two necessary elements for effective home rule. First, home rule must furnish local units with enough power to enable them to provide the required local services. Second, home rule must limit the power of the state legislature to enact local laws which interfere with the exercise of this power by local officials.<sup>4</sup> Experience has shown that powers of local self-government and limitations on the ability of the legislature to interfere with those powers must be constitutionally based.<sup>5</sup> Since one legislative session generally cannot bind a subsequent session, statutes providing local self-government can be repealed at any time. A permanent solution can be effected only by constitutional revision.

In Maryland, the county is the unit of local government best suited to exercise broad local powers. It serves a wide geographic area and, thus, is able to furnish the basic local services economically. At the same time, the Maryland county draws the loyalty of its citizens and is small enough to be responsive to their desires.

A more effective balance between the county and the state legislature can best be achieved through a scheme of constitutional home rule requiring that the state shall share its residual powers with the counties. Shared powers home rule for counties was included in the proposed new Constitution for Maryland adopted by the Maryland Constitutional Convention but defeated at a special election held May 14, 1968. The purpose of this study is to demonstrate the improvements which shared powers home rule for counties would make in the governmental structure of Maryland.

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tutional revision, see Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968).

4. See 1 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 3.01, at 97 (1968). The term "local law" is difficult to define in a technical sense, even when the definition is limited to Maryland. See, e.g., Crone, *Local Legislation for the Charter Counties of Maryland* (Md. Const. Conv., Research Memo No. 24, 1968); Moser, *Constitutional Distinctions among Public Local, Public General, and Special Laws* (Md. Const. Conv., LG Documents, 1968); Philips, *The Constitutional Definition of General Law* (Md. Const. Conv., Research Memo No. 102, 1968); notes 34, 41 & 54 *infra*. In a broader and non-technical sense, a "local law" is legislation applicable to one or a few units of local government and relating to matters of local concern. Various techniques for limiting local legislation in use in other states studied by the Maryland Constitutional Convention of 1968 are discussed in Hayes, *Methods of Enabling Local Legislation* (Md. Const. Conv., Research Memo No. 15, 1968); Moran, *Virginia and Mississippi Legislative Committees Dealing with Local and Private Legislation* (Md. Const. Conv., Research Memo No. 34, 1968); Committee Memorandum No. LG-1, at 6-7, 24-28 (Md. Const. Conv., 1968). See also Memo, *General Application of Laws, Constitutional Provisions and Cases, Illinois and Minnesota* (Md. Const. Conv., Research Memo No. 211, 1968). Unpublished memoranda of the Maryland Constitutional Convention of 1968 may be found in the State Law Library, Court of Appeals Building, Annapolis, Md. See also Satterfield, *Counties in a Straight-Jacket*, 37 NAT'L MUN. REV. 81 (1948); 76 HARV. L. REV. 652 (1963).

5. See *LOCAL LEGISLATION IN MARYLAND*, *supra* note 2, at 23-24.

## I. THE DEVELOPMENT OF LOCAL GOVERNMENTS

Both counties and municipalities<sup>6</sup> are local governmental units created by the state. Except to the extent that the state constitution restricts legislative regulation, both types of local government are subject to unlimited control by the legislature.<sup>7</sup> Municipal government in the United States was usually patterned on the English borough structure. Cities were voluntary units established by the residents and formed natural, self-contained social and economic units to provide local self-government and services. The first home rule grant to a city in this country was made to the City of St. Louis in 1875.<sup>8</sup> The avowed purpose of home rule was to alleviate the limitations upon the exercise of local governmental functions resulting from the application of the restrictive "Dillon's Rule,"<sup>9</sup> which requires a strict construction of constitutional or legislative grants of specific powers to local units of government. It was thought that by giving cities exclusive powers by constitutional provision, state legislatures would be restrained from enacting laws which interfered with local powers of self-government. Thus, cities would to some extent be freed from the domination of the rural areas which normally controlled state legislatures. The original home rule measures have been only partly successful, because courts have continued to narrowly construe the powers of home rule cities.<sup>10</sup>

The powers, functions, and structure of counties in the United States, and their freedom from legislative control, vary from state to state. In large measure the differences are attributable to a combination of emigration by the original settlers from different English counties or European countries, and differing local conditions in the original colonies.

6. In this study, the term "municipalities" as applied to Maryland is used to mean only the incorporated cities, towns and villages, except Baltimore City; and the term "counties" refers to the twenty-three existing Maryland counties. Baltimore City is referred to separately because it possesses some of the attributes of both municipalities and counties. See p. 339 & note 18 *infra*.

7. *E.g.*, *Neuenschwander v. Washington Suburban Sanitary Comm'n*, 187 Md. 67, 48 A.2d 593 (1946); *Castle Farms Dairy Stores, Inc. v. Lexington Market Authority*, 193 Md. 472, 67 A.2d 490 (1949); *Pressman v. D'Alesandro*, 211 Md. 50, 125 A.2d 35 (1956); See also 1 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 3.01, at 97 (1968), *LOCAL LEGISLATION IN MARYLAND*, *supra* note 2, at 8-10.

8. Appearing now as Mo. CONST. art. VI, § 19.

9. J. DILLON, *MUNICIPAL CORPORATIONS* 173 (2d ed. 1873):

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily* or fairly implied in, or *incident* to, the powers expressly granted, third, those *essential* to the declared objects and purposes of the corporation — not simply convenient, but indispensable. See also 1 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 3.01, at 97 (1968).

10. 2 E. McQUILLIN, *MUNICIPAL CORPORATIONS* § 10.18a, at 787-90 (1966). Maryland probably is no exception. See, *e.g.*, *Mayor & City Council v. Sappington*, 195 Md. 259, 73 A.2d 449 (1950); *Duval v. Lacy*, 195 Md. 138, 73 A.2d 26 (1950); *Mayor & City Council v. Canton Co.*, 186 Md. 618, 47 A.2d 775 (1945); *Hanlon v. Levin*, 168 Md. 674, 179 A. 286 (1935); *Rushe v. Hyattsville*, 116 Md. 122, 81 A. 278 (1911). All doubts are resolved against the existence of a municipal power. McQUILLIN, *supra*, § 10.19, at 790; *Rushe v. Hyattsville*, *supra*; *Mayor & City Council v. Sappington*, *supra*. But cf. cases cited note 49 *infra* and accompanying text and note 79 *infra*.

Generally speaking, counties have been subjected to a greater measure of legislative control than municipalities because, unlike municipalities, counties were not voluntarily created by their citizens. Usually counties were created by the state as administrative units intended to perform state services in smaller geographic areas.<sup>11</sup> As a result, home rule for counties came much later than municipal home rule. California was the first state to adopt a constitutional measure permitting county home rule, followed by Maryland, which made charter home rule available to its counties in 1915.<sup>12</sup>

Counties in Maryland were originally little more than broad, arbitrarily designated geographic areas, designed to administer state functions. Gradually, however, they took on greater policy-making responsibilities in local service fields than did counties in most other states. Maryland counties now provide, in varying degrees, such urban services as water, sewers, police protection, garbage collection, land use control, parks and recreation. This trend has brought counties into growing conflict with municipalities, which were created to provide the same services before counties were in a position to do so.<sup>13</sup> Some of these same urban services have also been provided on a multi-county scale in parts of Maryland. For instance, in Montgomery and Prince George's Counties, the Washington Suburban Sanitary Commission has provided sewer and water services since 1918, and the Maryland-National Capital Park and Planning Commission has provided planning, zoning and park services since 1937.<sup>14</sup>

There are far fewer independent units of local government in Maryland than in most other states. Only a small number of special purpose districts exist. Local services are provided for the most part within the framework of existing units, particularly by the counties.<sup>15</sup> Because Maryland is not fragmented into a large number of small centers of governmental power, local governmental responsibility for

11. See, e.g., *Town Comm'rs v. County Comm'rs*, 199 Md. 652, 87 A.2d 599 (1952); Benton, *The County Home Rule Movement in Texas*, 31 Sw. Soc. Sci. Q. 108 (1950); SNIDER, *LOCAL GOVERNMENT IN RURAL AMERICA* 104-06 (1957).

12. Ch. 416, [1914] Md. Laws 657, ratified November 2, 1915, now Md. CONST. art. XI-A. As of 1960, at least 15 states provided some form of constitutional home rule for counties. Ellwood, *County Home Rule and Charter Making*, in CONSTITUTIONAL REVISION STUDY DOCUMENTS, MARYLAND 241-42 (1968). For a general discussion of home rule in the United States, see W. GRAVES, *AMERICAN INTERGOVERNMENTAL RELATIONS* 700-12 (1964).

13. See J. SPENCER, *CONTEMPORARY LOCAL GOVERNMENT IN MARYLAND* 4-12, 97-114 (1965).

14. The Sanitary Commission is now provided for in PRINCE GEORGE'S COUNTY CODE §§ 83-1 to 83-165 (1963 & Supp. 1967), and MONTGOMERY COUNTY CODE §§ 71-1 to 71-108 (1965). The laws relating to the Planning Commission are codified in PRINCE GEORGE'S COUNTY CODE §§ 59-1 to 59-105 (1963 & Supp. 1967), and MONTGOMERY COUNTY CODE §§ 70-1 to 70-111 (1965). See also MD. ANN. CODE art. 66B, § 35 (1967). Numerous other regional agencies have been created. For instance, the Regional Planning Council for Baltimore City and the five surrounding counties was created in 1963, MD. ANN. CODE art. 78D, §§ 1-25 (1965 & Supp. 1967); the Metropolitan Transit Authority was created in 1961, MD. ANN. CODE art. 64B, §§ 1-18 (1968); and the Tri-County Council was established in Southern Maryland in 1967, MD. ANN. CODE art. 25, § 26A (1967).

15. J. SPENCER, *supra* note 13, at 1-2, 12. Massive reduction in the number of local governments in the United States is a primary recommendation of the Committee for Economic Development to improve the effectiveness of local government. MODERNIZING LOCAL GOVERNMENT, *supra* note 2, at 17.

providing local services is capable of clearer delineation than in most other states. For the same reason, the functions of units of local government are more readily capable of adjustment. Accordingly, Maryland has a better opportunity of achieving an effective local government structure than have most other states.

## II. HOME RULE STATUS OF COUNTIES AND MUNICIPAL CORPORATIONS UNDER THE PRESENT MARYLAND CONSTITUTION

Units of local government in Maryland may acquire constitutional home rule pursuant to three separate sections of the Constitution. All home rule municipalities are governed by Article XI-E. The counties and Baltimore City may adopt either charter home rule under Article XI-A or code home rule under Article XI-F.<sup>16</sup> In addition, the counties which have not adopted either charter or code home rule have some degree of legislatively granted powers of local self-government.<sup>17</sup>

Baltimore City was the first Maryland unit of local government to achieve charter home rule under Article XI-A. Baltimore City possesses attributes of both a county and a municipality, but generally is treated by the Constitution as an independent county for home rule purposes.<sup>18</sup> Of the twenty-three Maryland counties, so far only five

16. MD. CONST. art. XI-E (municipal corporations); MD. CONST. art. XI-A (charter counties); MD. CONST. art. XI-F (code counties). The General Assembly has enacted laws implementing and defining these constitutional provisions. MD. ANN. CODE art. 23A (1965) (municipal corporations); MD. ANN. CODE art. 25A (1966) (charter counties); MD. ANN. CODE art. 25B (Supp. 1967) (code counties). See also BALTIMORE CITY CHARTER § 6 (1949), containing the powers of Baltimore City.

17. MD. ANN. CODE art. 25, §§ 3, 1-218 (1966 & Supp. 1967).

18. Article XI-A, in effect, supersedes Article XI with respect to Baltimore City, except for the credit limitations of § 7 of Article XI. See, e.g., *Graham v. Joyce*, 151 Md. 298, 134 A. 332 (1926). In the first state Constitution, Baltimore City was permitted to elect its representatives to the General Assembly separately from Baltimore County, of which it then was a part, geographically and politically. MD. CONST. art. III, §§ 2-4 (1776); A. NILES, MARYLAND CONSTITUTIONAL LAW 406 (1915); CONSTITUTIONAL REVISION STUDY DOCUMENTS, *supra* note 12, at 375-76. The city received a limited measure of self-government when it was granted its first charter, effective in 1797. Ch. 68, [1796] Md. Laws. The Constitution of 1851 for the first time treated Baltimore City as a separate unit for all purposes. CONSTITUTIONAL REVISION STUDY DOCUMENTS, *supra* note 12, at 418-42. See also chs. 17, 18, 86, 375, [1852] Md. Laws; ch. 253, [1853] Md. Laws 339; ch. 248, [1858] Md. Laws 362; *Pressman v. D'Alesandro*, 211 Md. 50, 125 A.2d 35 (1956). Since 1898, Baltimore has exercised within its boundaries "... the Police Power to the same extent as the State has. ..." BALTIMORE CITY CHARTER § 6(24) (1949). This provision was added to a narrower grant of the police power by the 1898 Baltimore City Charter. Ch. 123, § 6, [1898] Md. Laws 244. Compare MD. CODE PUB. LOC. LAWS art. 4, § 721 (1888). See also BALTIMORE CITY CHARTER §§ 6(39), 6(41) (1949). Then, in the Constitution of 1867, Article XI was devoted exclusively to the structure of the government of Baltimore City. MD. CONST. art. XI. But this did not give Baltimore City home rule in the generally accepted sense. § 9 of Article XI permitted the General Assembly to change the provisions of Article XI, except those relating to the creation of debt and the loan of credit, and stated:

... this Article shall not be so construed or taken as to make the political Corporation of Baltimore independent of, or free from the control which the General Assembly of Maryland has over all such Corporations in this State.

MD. CONST. art. XI, § 9. No limitation was placed on interference with the internal affairs of the city, the home rule powers of the city were not increased, and all of Article XI, except § 7, could just as well have been enacted as a law. See A. NILES, *supra*, at 313; THOMAS, THE CITY GOVERNMENT OF BALTIMORE 47, 70 (1896). The

have adopted charters using the complex and time-consuming mechanics provided by Article XI-A.<sup>19</sup>

Article XI-A is not self-executing. Rather, it directs the legislature to provide a grant of express powers for the charter counties and for Baltimore City.<sup>20</sup> The express powers of charter counties are found in the express powers act, which has frequently been amended to enlarge those powers. However, these amendments to the express powers of charter counties and the special enabling laws adding to the powers of one or several charter counties usually have involved specific powers needed to meet a current problem. Charter counties have never been granted, within their boundaries, ". . . all the power commonly known as the Police Power to the same extent as the state has or could exercise said power. . . ."<sup>21</sup> Baltimore City, however, has exercised this broad power as the result of public local law enacted twenty years before it adopted a charter pursuant to Article XI-A of the Constitution.<sup>22</sup> A charter county or Baltimore City may enact, repeal or amend

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power to make changes in §§ 1 to 6 of Article XI granted to the General Assembly by the 1867 Constitution was transferred by the 1913 amendment to the voters of Baltimore City to be exercised by charter amendment, but only after an express grant of power by the legislature. MD. CONST. art. XI-A, § 6; BALTIMORE CITY CHARTER § 6(41) (1949), first enacted as a local law in 1920. Only after Baltimore City readopted its 1898 Charter with minor changes in 1918, pursuant to Article XI-A, did it achieve true home rule status. See BALTIMORE CITY CHARTER at ix-xvii (1949). For a history of the government of Baltimore, see THOMAS, *supra*, at 47-100; and J. SCHARF, HISTORY OF BALTIMORE CITY AND COUNTY 167-79 (1881).

19. Charters were adopted in the counties of Montgomery in 1948, Baltimore in 1956 and Anne Arundel and Wicomico in 1964. MARYLAND MANUAL 421 (1967-68). In November, 1968, Howard County voters adopted a charter, and Prince George's County voters selected a charter board to draft one to be submitted to the voters in 1970. See *The Sun* (Baltimore), Nov. 6, 1968, at A10-11. Under the 1915 amendment, charter home rule can be initiated only upon petition of twenty per cent of the registered voters of a county (or 10,000 voters, if that is less). Generally the procedure takes more than two years. See Nichols, County Home Rule in Maryland 15-19, May, 1967 (unpublished thesis in the American University Library, Wash., D.C.). The Legislative Council Constitutional Revision Subcommittee for Local Government has recommended a provision permitting the county commissioners to appoint a charter board, the members of which would run for election if other names were placed in nomination by petition. The procedures were shortened so that a county could draft and adopt a charter within a year. 1 REPORT TO THE GENERAL ASSEMBLY OF 1969, PROPOSED BILLS 103. This is substantially the same as the arrangement which the Constitutional Convention recommended. PROPOSED MD. CONST., SCHEDULE OF LEGISLATION § 28 (1968). See also LOCAL LEGISLATION IN MARYLAND, *supra* note 2, at 47, 54.

20. MD. CONST. art. XI-A, § 2. The enumerated powers of all charter counties are contained in MD. ANN. CODE art. 25A (1966). The basic powers of Baltimore City are contained in BALTIMORE CITY CHARTER § 6 (1949). Additional powers of charter counties and Baltimore City are contained in scattered sections of the Annotated Code of Maryland and in the public local laws of the several charter counties.

21. BALTIMORE CITY CHARTER § 6(24) (1949).

22. Note 18 *supra*. Compare MD. ANN. CODE art. 25A, § 5(S) (1966), providing in part, as to the express powers of charter counties:

The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.

Provided, that the powers herein granted shall only be exercised to the extent that the same are not provided for by public general law; provided, however, that



local laws dealing with matters falling within their express powers. This power is subject to the general laws of the state and to the limitations contained in the Constitution.<sup>23</sup> The power to enact local legislation granted to charter counties is a most important provision of Article XI-A. An equally important feature, however, is that for the first time limits were placed on the enactment of local legislation by the General Assembly respecting both charter counties and Baltimore City.<sup>24</sup> After a charter is adopted, the legislature is prohibited from enacting "local laws" applicable to only one charter county or to Baltimore City on matters covered by their express powers.<sup>25</sup> This regulation has not, however, proved as effective as it might have been because the General Assembly may exempt any number of charter counties from a "general law", may enact a law on any matter of "state concern" applicable to just one charter county or the city, and may still enact a law applicable to any two or more charter counties or the city on subjects included within the express powers.<sup>26</sup>

The Municipal Home Rule Amendment was ratified in 1954 and added to the Maryland Constitution as Article XI-E. Its provisions

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no power to legislate shall be given with reference to licensing, regulating, prohibiting or submitting to local option, the manufacture or sale of malt or spirituous liquors.

A broad grant of police power, like the grant to Baltimore City, carries with it the power to prescribe reasonable regulations, subject to constitutional limitations, "which are necessary to protect the public health, comfort, order, safety, convenience, morals and general welfare." *Stevens v. City of Salisbury*, 240 Md. 556, 564, 214 A.2d 775, 779 (1965). It is a flexible grant of power: "There can be little doubt that the ever-growing complexities of our society will call, 25 years from now, for regulations under the State's police power not now thought of." *Id.*

23. Md. CONST. art. XI-A, § 3, which requires a charter to provide for an elective legislative body and to set forth the number of days it may sit for the purpose of enacting legislation. Total legislative days may not exceed forty-five in number, but need not be consecutive. See *Schneider v. Lansdale*, 191 Md. 317, 61 A.2d 671 (1948), holding in part that the forty-five day limitation of § 3 does not prevent additional days being devoted to non-legislative business such as the passage of resolutions concerning budgets and assessments. However, the forty-five day limitation does not apply to Baltimore City. To learn the effect of § 3, see, e.g., *Murray v. Director of Planning*, 217 Md. 381, 143 A.2d 85 (1958); *Heubeck v. Mayor & City Council*, 205 Md. 203, 107 A.2d 99 (1954); *County Comm'rs v. Supervisors of Elections*, 192 Md. 196, 63 A.2d 735 (1948); *State v. Stewart*, 152 Md. 419, 137 A. 39 (1927).

24. Compare J. SPENCER, *supra* note 13, at 20-26.

25. MD. CONST. art. XI-A, § 4, provides:

From and after the adoption of a charter under the provisions of this Article by the City of Baltimore or any County of this State, no public local law shall be enacted by the General Assembly for said City or County on any subject covered by the express powers granted as above provided. Any law so drawn as to apply to two or more of the geographical sub-divisions of this State shall not be deemed a Local Law, within the meaning of this Act. The term "geographical sub-division" herein used shall be taken to mean the City of Baltimore or any of the Counties of this State.

A constitutional exception was later made with respect to General Assembly authorization to a county to carry out urban renewal projects. MD. CONST. art. III, § 61(e). Compare MD. CONST. art. III, § 33, relating to special and local legislation for noncharter counties.

26. See pp. 342-43 *infra*. Notwithstanding this limitation, vast quantities of local laws are enacted in each session for the charter counties. For instance, in 1967, where 402 local bills out of 766 total bills were enacted, 129 of the local bills were applicable to Baltimore City and the four charter counties. Thus, when fifty-two per cent of the legislative work product constituted local legislation, nearly seventeen per cent of the entire legislative work product was local legislation for the charter counties. Committee Memorandum No. LG-1, *supra* note 4, at 40, 42.

had been recommended by the Sobeloff-Stockbridge Commission in 1952 as one of several proposed major reorganizations of the state governmental structure. The principal purpose of the amendment was to provide broader autonomy to incorporated cities, towns and villages in Maryland and thereby to reduce the large volume of municipal legislation regularly enacted each year by the General Assembly.<sup>27</sup> The grant of powers to municipalities is general, rather than specific; it permits towns and cities to freely adopt, amend and repeal charters and to amend or repeal local laws relating to their "incorporation, organization, government, or affairs."<sup>28</sup> Article XI-E also prohibits the General Assembly from passing local laws "relating to the incorporation, organization, government, or affairs" of municipalities. Those laws are required to apply to all municipalities generally or to all within one of the classes into which the General Assembly was directed, by Article XI-E, to divide all municipalities.<sup>29</sup> As a result of Article XI-E, the General Assembly no longer enacts municipal charters or considers local laws relating to the internal affairs of municipalities, except with respect to appropriations, maximum property tax and debt

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27. LOCAL LEGISLATION IN MARYLAND, *supra* note 2, at 1-5, 28-41, 50-52.

28. MD. CONST. art. XI-E, § 3. See also MD. ANN. CODE art. 23A, § 2 (1966); G. BELL & J. SPENCER, *THE LEGISLATIVE PROCESS IN MARYLAND* 6-7 (2d ed. 1963). Prior to 1954 municipal charters were enacted by the General Assembly by local law. A model charter is now provided by general law. See MD. ANN. CODE art. 23B, §§ 1-103 (1966). The Sobeloff-Stockbridge Commission described the arrangement which they proposed for municipalities as follows:

The proposed constitutional amendment would not define matters of municipal organization, government, and affairs concerning which the General Assembly could pass no local laws. Since local affairs are not spelled out in the present Constitution, final determination as to what they are would continue to remain in the courts. Some states, in their home rule amendments, do attempt to list local powers, but such listings still must be made in general terms unless many pages are to be added to a state constitution. Also, the necessity for court interpretations of the listed powers probably could not be avoided. Furthermore, matters considered solely as local in nature must be reviewed as circumstances change. While regulation of traffic speeds was undeniably a local matter in 1800, today it is clearly of State concern to an ever-increasing extent. A reasonable listing of local powers today may seem very illogical twenty years from now. To ensure flexibility it seems preferable not to include a list of local powers in the Constitution. On matters of State concern, not affecting the government of municipalities as, for example, fish and game laws, the General Assembly would continue to enact local laws.

LOCAL LEGISLATION IN MARYLAND, *supra* note 2, at 32-33. Thus, Article XI-E leaves for court determination on a case by case basis whether a matter is of local or state concern. Only if the subject of the legislation is of state concern can the General Assembly act by local law. See *Hitchins v. Mayor & City Council*, 208 Md. 134, 117 A.2d 854 (1955). § 3 of Article XI-E has been interpreted as giving municipal corporations broad powers to govern themselves in local matters. See, e.g., *Woelfel v. Mayor & Alderman*, 209 Md. 314, 121 A.2d 235 (1956), holding that § 3 of Article XI-E authorized amendment of the Annapolis City Charter respecting debt limitations, borrowing power, rate of taxation and authorized bonding indebtedness, notwithstanding the fact that § 5 of Article XI-E permits the General Assembly to enact local laws on these matters; § 5 did not grant the General Assembly this power exclusively. See text accompanying note 48 *infra*.

29. MD. CONST. art. XI-E, §§ 1, 2. The General Assembly is directed to divide municipal corporations into not more than four classes based on population. In 1955, all municipal corporations were placed in a single class. MD. ANN. CODE art. 23A, § 10 (1966). This has worked satisfactorily. Exceptions were made to the general law requirement to permit the General Assembly by local law to impose maximum limits on the rate of property taxes and the amount of debt of a municipality. MD. CONST. art. XI-E, § 5. See also MD. CONST. art. III, § 61(e).

limits, and matters of "state concern." Under the general laws enacted following the adoption of Article XI-E, a new municipality must have the approval of the county governing body.<sup>30</sup> There are now about 150 in the state, and no new ones have been created since 1954.<sup>31</sup>

A simplified method of adopting home rule for Maryland counties was provided by a constitutional amendment, ratified in 1966,<sup>32</sup> which became Article XI-F of the Constitution. Code home rule, as it is called, must be initiated by a resolution of the county commissioners and then approved by a majority of those voting on the question at the next general election.<sup>33</sup> Code counties may enact local laws applicable to "the incorporation, organization or government" of the county, by action of its county commissioners.<sup>34</sup>

The Constitution prohibits the General Assembly from enacting a local law applicable to only one code county.<sup>35</sup> However, since the

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30. MD. ANN. CODE art. 23A, § 21 (1966).

31. J. SPENCER, *supra* note 13, at 37. While a county may veto a new municipal incorporation, it has little control over the annexation of new territory by an existing municipal corporation within its boundaries. The enactment in 1955 of what is now MD. ANN. CODE art. 23A, § 19 (1966), was successful in eliminating the General Assembly's participation in municipal annexation which theretofore had been accomplished through public local laws. See J. SPENCER, *supra* note 13, at 38-40. But this arrangement can be used by developers to obtain rezoning to commercial or industrial use zones through a municipality bidding against the county for the increased tax base so to be derived. How this works is illustrated in *Mayor & Council v. Brookeville Turnpike Constr. Co.*, 246 Md. 117, 228 A.2d 263 (1967). There is also little incentive for a municipal corporation to annex areas affording a low tax yield and requiring extensive municipal services. It seems clear that a boundary commission or other arbiter should ultimately decide annexation issues initiated by the residents of the area affected. See, e.g., ALAS. STAT. ANN. tit. 29, 44 (1965). See also NATIONAL LEAGUE OF CITIES, ADJUSTING MUNICIPAL BOUNDARIES (1966) (analyzing annexation procedures in all states); C. BAIN, ANNEXATION IN VIRGINIA (1966) (analyzing the judicial method of adjusting boundaries, which is unique to Virginia).

32. Ch. 493, [1965] Md. Laws 694, now MD. CONST. art. XI-F. This has been supplemented by general laws of the General Assembly. MD. ANN. CODE art. 25B, §§ 1-19 (Supp. 1967). Code home rule was based on *Report of the Legislative Council Committee on Local Legislation* in REPORTS OF THE LEGISLATIVE COUNCIL 361 (1964).

33. MD. CONST. art. XI-F, § 2. The resolution of the governing body must be adopted by at least a two-thirds vote. The constitutional amendment refers to "the governing body of any county," but MD. ANN. CODE art. 25B, §§ 3, 4 (Supp. 1967), refer to "board of county commissioners." Charter counties are governed by county councils with or without county executives, and not by boards of county commissioners. Nevertheless, it seems plain that a charter county could shift to code county home rule under Article XI-F, provided the procedure set out in § 5, Article XI-A, also is followed.

34. MD. CONST. art. XI-F, § 3. "Public local law" is defined in § 1 as:

[A law applicable] to the incorporation, organization, or government of a code county and contained in the county's code of public local laws; but this latter term specifically does not include (i) the charters of municipal corporations under Article 11E of this Constitution, (ii) the laws or charters of counties under Article 11A of this Constitution, (iii) laws, whether or not Statewide in application, in the code of public general laws, (iv) laws which apply to more than one county, and (v) ordinances and resolutions of the county government enacted under public local laws.

The constitutional grant of general power is broader than the powers enumerated by reference in Article 25B, § 13 of the Code, to the Express Powers provisions of Articles 25 and 25A. Therefore, § 13 of Article 25B seems redundant.

35. MD. CONST. art. XI-F, § 4, states:

Except as otherwise provided in this Article, the General Assembly shall not enact, amend, or repeal a public local law which is special or local in its terms or effect within a code county. The General Assembly may enact, amend, or repeal public local laws applicable to code counties only by general enactments which in

legislature can enact local legislation which applies to a class of code counties, this prohibition can be circumvented by classifying code counties so that only one county meets the criterion of a given class. Such a classification would permit the General Assembly to pass laws regulating the "incorporation, organization and government" of that single county.<sup>36</sup> As a result, code counties are potentially subject to more control by the General Assembly than are charter counties.

Efforts to adopt code home rule in the Maryland counties were withheld because of the impending Maryland Constitutional Convention. With the defeat of the proposed new Constitution, the county commissioners of three counties passed the necessary resolutions to place the question of adopting code home rule in those counties on the November, 1968 ballot. Code home rule was resoundingly defeated in all three counties.<sup>37</sup> Opposition to code home rule arose because: (1) the arrangement perpetuates the county commissioners, with whom some citizens are dissatisfied, and increases these commissioners' powers; (2) this form prevents an effective separation of the legislative and executive branches of county government; and (3) code home rule does not permit the voters to adopt and to amend a basic instrument of county government.<sup>38</sup>

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term and effect apply alike to all code counties in one or more of the classes provided for in Section 5 of this Article.

But "public local law" is defined in § 1 so as to exclude from the term, "laws which apply to more than one county." Note 34 *supra*. For this reason, the requirement in the second sentence of § 4 appears to be meaningless. In addition, "public local law" does not include any law, "in the code of public general laws." *Id.* Many laws regulating the internal affairs of a single county appear in this code, and often a large number of counties are exempted from a general law. The result of this is to render practically ineffective the local law limitation placed on the General Assembly in connection with code counties. The direction contained in § 5 of Article XI-F to group code counties into not more than four classes based on population or other criteria has resulted in the General Assembly creating a single class. MD. ANN. CODE art. 25B, § 2 (Supp. 1967).

36. See note 29 *supra*.

37. The counties were Carroll, Cecil and Frederick. See *The Sun* (Baltimore), Nov. 6, 1968, at A10-11. The margins of defeat were approximately eight to one in Carroll, and five to one in Cecil and Frederick Counties. Carroll County voters at the same time rejected a proposal to write a charter by a seven to four margin. One may speculate that when a county is ready to accept constitutional home rule, charter home rule is more likely to receive voter acceptance than code home rule.

38. The reasons for the opposition are not fully justified. Criticism (1) can be cured by electing new county commissioners at the general election at which code home rule also is on the ballot; it is a criticism based on personalities and not on the form of government. Criticism (2) is not entirely accurate. The code county commissioners probably could create a separate county executive by public local law. Although the next year the commissioners could abolish the office, if the executive became unpopular with them, the repealer would be subject to referendum on petition of not less than five per cent of the registered county voters. MD. CONST. art. XI-F, § 7; MD. ANN. CODE art. 25B, § 10(h) (Supp. 1967). But it remains true that, (i) a code county executive appointed or elected under a public local law surely would tend to be more subservient to the legislative arm than would one appointed to the position with tenure guaranteed in the county charter; (ii) the county commissioners would not be likely to create a separate county executive in the first place, or if they did, they would not clothe him with sufficient powers to act independently of them; and (iii) the referendum requirement applies only to "public local laws" and not to "ordinances and resolutions" of the commissioners. MD. CONST. art. XI-F, § 1(2)(v). Presumably, the commissioners could avoid a vote of the people by acting through an ordinance or a resolution, neither of which is subject to county referendum on enactment or repeal. The General Assembly might also establish a separate executive

Although eighteen of the twenty-three Maryland counties do not have constitutional home rule,<sup>39</sup> the General Assembly has granted limited powers of self-government to these counties.<sup>40</sup> The General Assembly, however, remains entirely free at any time to withdraw, on a county-by-county basis, these limited governmental powers. Moreover, the legislature can, and regularly does, enact laws regulating the internal affairs of any one of these eighteen counties.<sup>41</sup>

through a general law pursuant to Article XI-F. Criticism (3) obviously is justified, if one accepts the premise that a county charter is necessary to good county home rule. However, this premise may not be sound when applied to the more rural counties. Experimentation with the greater autonomy afforded by code home rule may in fact help pave the way for charter home rule when eventually the pressures of population and development require the change.

39. The rural counties are not the only counties lacking constitutional home rule. Prince George's County, a populous and rapidly growing urban county, has only legislatively granted powers of self-government. This county may soon have charter home rule, however; its voters approved the drafting of a charter in November, 1968. See note 19 *supra*.

40. MD. ANN. CODE art. 25 (1966 & Supp. 1967) contains grants of widely varying enumerated powers to the non-charter counties and is full of exceptions. For instance, the basic grant contained in § 3 of that article starts with:

(a) *Excepted counties.* — The county commissioners of each county in this State, except Worcester, Prince George's, Washington (except as hereinbelow provided), Somerset, Baltimore, Anne Arundel, Cecil, Howard and Queen Anne's (except as specifically provided in subsection (f)), counties, in addition to, but not in substitution of the powers which have been or may hereafter be granted them, shall have the following express powers: . . .

In essence, Article 25 is a series of public local laws. Some sections of Article 25 grant specific powers to one or several counties; others speak in mandatory terms and relate to the internal government of a single county; and very few sections apply generally even to all non-charter counties. But most importantly, the General Assembly is entirely unlimited in passing local laws with respect to counties not having constitutional home rule. See MD. CONST. art. III, § 33.

41. See MD. CONST. art. III, § 33, relating to local and special laws. For the meaning of the provision, see, e.g., *Lankford v. County Comm'rs*, 73 Md. 105, 20 A. 1017 (1890); *Bradshaw v. Lankford*, 73 Md. 428, 21 A. 66 (1890); *State ex rel. County Comm'rs v. Baltimore & O. R.R.*, 113 Md. 179, 77 A. 433 (1910); *Funk v. Mullan Contracting Co.*, 197 Md. 192, 78 A.2d 632 (1950); *Norris v. Mayor & City Council*, 172 Md. 667, 192 A. 531 (1937). Generally respecting the problems of local and special legislation in Maryland, see Leser, *Report on the Evils of Special and Local Legislation*, 9 TRANSACTIONS MD. STATE BAR ASS'N 160-85 (1904); V. KEY, *THE PROBLEM OF LOCAL LEGISLATION IN MARYLAND* (State Planning Commission Pub. No. 27, Legislative Council Research Rep. No. 3, 1940); C. EVERSTINE, *SUPPLEMENTAL REPORT ON LOCAL LEGISLATION* (Legislative Council Research Rep. No. 21, 1942); C. EVERSTINE, *LOCAL GOVERNMENT: A COMPARATIVE STUDY* (Legislative Council Research Rep. No. 23, 1944); *LOCAL LEGISLATION IN MARYLAND*, *supra* note 2; Committee Memorandum No. LG-1, *supra* note 4, at 39-47. Examples of a few local laws passed by the 1968 Session serve to show how the General Assembly is involved in minor local matters (references are to [1968] Md. Laws): (i) *Chapter 110* — required Allegany County to provide expense allowances for the members of a zoning board exercising jurisdiction in a part of the county; (ii) *Chapter 318* — authorized Caroline and Calvert Counties to adopt building and housing codes; (iii) *Chapter 215* — required Cecil County to appropriate \$36,000 annually for the support of the nine volunteer fire companies in that county, and contained an itemized list of how much each fire company should receive; (iv) *Chapter 335* — authorized the Frederick County Commissioners to pass regulations for dog licenses and otherwise to control stray dogs, and set standards for adoption of such regulations; (v) *Chapter 315* — established and described an official flag and seal for Kent County; and (vi) *Chapter 321* — amended laws concerning bingo playing in Worcester County to make them applicable only in the third, fifth and tenth election districts of that county. In 1964 when it recommended the Code Home Rule Amendment, the Legislative Council Committee also approved the expansion of the powers of counties in § 3 of Article 25. REPORTS OF THE LEGISLATIVE COUNCIL, *supra* note 32, at 363. Some expansion of powers has been granted. Ch. 492, [1965] Md. Laws 693; ch. 308, [1966] Md. Laws 597.

### III. THE DISADVANTAGES OF THE PRESENT SYSTEM

Before analyzing shared powers home rule in detail, it is necessary to test the existing county home rule provisions against the two basic elements of effective home rule to see how the present arrangement falls short. As previously mentioned, these elements are, first, the provision of local units with sufficient powers of self-government and, second, an effective limitation on the power of the state legislature to enact local laws interfering with the exercise of local powers by local officials. The present system, it is submitted, does not adequately provide either of these vital elements.

#### *A. Charter Counties Have Insufficient Powers of Self-Government*

Insufficient power of self-government is the most significant failure of the present arrangement. The powers of charter counties are inadequate both in an absolute sense and in a relative sense when compared with the powers of self-government possessed by code counties and municipalities.

Baltimore City occupies a unique position under Article XI-A of the Constitution. Even before this constitutional provision was adopted, the General Assembly had granted the city all of the state's police powers to be exercised within the city's territorial limits.<sup>42</sup> This broad grant of state police powers has supplied the legal basis for all city regulatory measures not covered by other specific grants to the city and falling within the general category of public health, comfort, order, safety, convenience, morality and general welfare. Unlike Baltimore City, however, charter counties have no such broad grant of police power, and are limited to the powers enumerated in the express powers act.<sup>43</sup> Since Article XI-A was adopted fifty-three years ago, it is reasonable to assume that the General Assembly will not amend the express powers act to provide the same broad general police powers for charter counties as its predecessor granted to Baltimore City. The absence of a broad grant of powers to charter counties has created some doubt and confusion in the administration of charter county affairs. Under Dillon's Rule, strict construction of the enumerated powers may prevent the county from performing some purely local function which it has not been expressly granted the power to perform, or may leave the question in doubt. Under the express powers act for charter counties, for example, it has been unclear whether a county may create a community relations commission, enact a fair housing ordinance or cope freely with emergency weather conditions. Charter county solicitors now must review the express powers act, special local enabling laws and then the public general laws to determine if the county can enact a given new ordinance. When the general language of the express powers act leaves unclear the right of the county to enact a local ordinance, the county has three courses

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42. See note 18 *supra*.

43. See note 22 *supra*.

of action: (1) go to the General Assembly for express authority; (2) seek a declaratory judgment authorizing the action; or (3) pass the ordinance in the hope that no taxpayer will challenge it.

It seems clear that code home rule is appropriate for the more rural counties as a transitional measure towards charter home rule. Not only is code home rule simpler to achieve, but rural counties may not require the complex administrative structure and separation of powers made practicable only by charter home rule. An urban county functions better with separate executive and legislative branches, and a division of these branches is not practical under code home rule.<sup>44</sup> Urban counties are more likely to adopt the charter form of government. Logically, then, charter counties should have broader powers than code counties, but the opposite is the case. Code counties have the broad general power to pass laws applicable to their "incorporation, organization or government,"<sup>45</sup> but charter counties must rely upon the enumerated powers.

Although code counties probably have powers of self-government equal to the powers of municipalities under Article XI-E, charter county powers obviously fall far short of the powers of municipalities.<sup>46</sup> The problems of urbanizing counties are becoming extremely complex. Counties today are called upon to provide new types of local services in addition to those which municipalities historically have furnished. Nevertheless, the General Assembly seems unwilling to provide more expansive powers to charter counties.<sup>47</sup>

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44. See note 38 *supra* and accompanying text.

45. See note 34 *supra*. "[Code home rule] provides for the granting of broader powers of home rule to a county than does Article 11A of the Constitution." REPORTS OF THE LEGISLATIVE COUNCIL, *supra* note 32, at 362.

46. Even before the ratification of Article XI-E, municipalities might exercise relatively broad police powers. See MD. ANN. CODE art. 23A, § 2 (1966). See also *Town Comm'rs v. County Comm'rs*, 199 Md. 652, 87 A.2d 599 (1952). Article XI-E probably amounts to a grant to municipalities of all of the state's police powers to be exercised within the municipal geographic limits. Note 28 *supra*. Bell and Spencer conclude that the Municipal Home Rule Amendment provides that, "... municipalities may assume and exercise powers unless specifically prohibited by law applicable to all of them." G. BELL & J. SPENCER, *supra* note 28, at 7. Of course, this conclusion assumes that the General Assembly will not divide municipalities into classes. It suggests that municipalities possess the broadest police powers and that the concurrent powers theory applies to validate municipal laws not inconsistent with state laws in the same way that the Court of Appeals has applied it to validate Baltimore City ordinances. See note 79 *infra*. Possibly more limited powers were intended for code counties than for municipalities by omitting from the description of those matters upon which the local unit may legislate in § 1 of Article XI-E the word "affairs," which appears in § 3 of Article XI-E. The Legislative Council Report for the Code Home Rule Amendment gives no reason for the omission. But a likely explanation for the omission is that the General Assembly believed the word "affairs" did not broaden the phrase, "incorporation, organization or government."

47. The Sobeloff-Stockbridge Commission had also recommended constitutional amendments designed, (1) to make it easier for counties to adopt charters by adding that the county commissioners might initiate an election for a charter board, as well as the county voters by petition (see note 19 *supra*); (2) to add to the powers of charter counties by permitting county councils to enact ordinances pertaining to the "property, affairs and government" of the county, regardless of whether a specified power was one of those enumerated in the express powers act; and (3) to require the General Assembly to act with respect to counties only by general law, applicable in its terms and effects to all counties or to all counties within one of the classes into

Courts in some other states have invalidated laws passed by units of local government as attempts to legislate on matters of state, rather than local concern.<sup>48</sup> The Maryland Court of Appeals, however, has rejected this basis for finding local ordinances unconstitutional, at least where the local unit possesses a general grant of power, holding instead that it may act concurrently with the state:

It would appear that the tests of general laws was devised, not to draw an impermeable line between the authority of the City and the State, but rather merely to define the inclusive limits of the State's powers. "General" under this test merely means that the subject is of sufficient statewide effect to give the State authority to legislate. It does not mean that it is not of sufficient local effect to give the City at least concurrent power to legislate.<sup>49</sup>

Applied mainly in upholding ordinances of Baltimore City enacted pursuant to its broad grant of the police and taxing powers, this rule would also be applicable in cases involving code counties and municipalities. For this rule to apply, however, the unit of local government must previously have been granted the power to act in the subject area. The concurrent power rule is less likely to apply to ordinances of charter counties because they lack a broad, general grant of power. Of course, to be valid under this rule the local ordinance must not be in direct conflict with a state law on the subject.<sup>50</sup>

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which the General Assembly was directed to divide the counties and Baltimore City. LOCAL LEGISLATION IN MARYLAND, *supra* note 2, at 5-7, 42-49, 53-61. The General Assembly rejected the recommendations. An effect of this rejection coupled with the adoption of the recommendations respecting municipalities has been to increase the disparity between the powers of Maryland municipalities and counties. Maryland counties no longer are merely administrative units performing state services. Rather, they have become more like municipalities with forms of local government voluntarily created by their citizens. Therefore, no sound reason exists for municipalities having greater powers than counties. The proposed Constitution sought to remedy this disparity in powers. Its effect would have been to elevate the legal powers of counties above those which municipalities have enjoyed since 1954. Moreover, the General Assembly would have been free to shift functions from municipal corporations to the counties at the point in time when counties were better able to provide the services economically. If in some part of the state the services should be provided by a regional agency, the General Assembly could have shifted the service to an existing or newly created regional unit of government. Or, a state agency could have been empowered to perform the function in parts of the state. PROPOSED MD. CONST. §§ 3.22, 7.05, 7.08 (1968).

48. See 1 C. ANTIEAU, MUNICIPAL CORPORATIONS §§ 3.12-3.16, at 131-42 (1968), for ordinances which courts elsewhere have invalidated as attempts of local units to legislate on matters of state concern. Many of the same subjects also have been held to be local in nature and not matters of state concern. *Id.* at §§ 3.17-3.36, at 142-64.12.

49. American Nat'l Bldg. & Loan Ass'n v. Mayor & City Council, 245 Md. 23, 31, 224 A.2d 883, 887 (1966), quoting with approval, Prendergast, J., below, in holding that Baltimore City had the power to impose a tax on the savings and loan business in the city, notwithstanding that the state recently had enacted broad regulatory legislation of the savings and loan industry; the state laws did not pre-empt the field, and hence the city concurrently might enact a local tax law, the provisions of which did not directly conflict with state law. The rule first was applied in *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909). Compare cases cited note 79 *infra* with cases cited note 10 *supra*.

50. See note 79 *infra*.



*B. There Is No Effective Limitation on the Power of the General Assembly to Interfere in Local Government*

Granted a lesser degree of enumerated power to start with, a county without constitutional home rule also faces the danger of having this limited power sharply curtailed by a local law passed by the General Assembly which does not affect the powers of any other county. This condition should create a desire in the county's citizens to elect one of the two forms of constitutional home rule, particularly since their local needs are not so readily met by a reapportioned state legislature. Code home rule is the more likely form that the county commissioners of these counties will select, because it can be attained through a simpler procedure and will result in a governmental structure with which they are more familiar. Moreover, code home rule provides a county with broader powers of self-government than does charter home rule. However, the results of the 1968 referenda on the adoption of code home rule suggest that voter opposition renders code home rule difficult to achieve.<sup>51</sup> Baltimore City probably faces a similar danger of having its broad powers curtailed by a law amending its express powers. Section 2 of Article XI-A provides that, "... the powers heretofore granted to the City of Baltimore, as set forth in Article 4, Section 6, Public Local Laws of Maryland, . . . may be extended, modified, amended or repealed by the General Assembly."<sup>52</sup>

Further, no effective restriction is placed on the power of the General Assembly to enact local legislation affecting any county. While the General Assembly is prohibited from enacting a public local law applicable to a single code county or charter county on any matter covered by the Express Powers Act, a law applicable to two or more charter or code counties is not considered a "local law."<sup>53</sup> The General Assembly is completely free to exempt any number of counties from a law labeled "general."

The present local law restrictions have been rendered even less effective by judicial interpretation applying the state concern rule to validate laws of the General Assembly even though they regulate in-

51. See note 37 *supra* and accompanying text.

52. Md. CONST. art. XI-A, § 2. See also Md. CONST. art. XI-A, § 4, prohibiting the General Assembly from passing a law applicable only to Baltimore City "... on any subject covered by the express powers granted as above provided." § 4 would not prevent the legislative amendment of § 6 of the Charter by a local law *expressly* doing so. But the General Assembly cannot amend a provision of § 6 by implication by passing a local law on a subject covered by § 6 and inconsistent with it. See *State v. Stewart*, 152 Md. 419, 137 A. 39 (1927), holding that the General Assembly could not grant to the Police Commissioner of Baltimore City the power to prescribe parking regulations in the city, because this was a local law regulating the use of the streets; regulating the streets is a function granted to the Mayor and City Council by the express powers act for Baltimore City. See BALTIMORE CITY CHARTER § 6(29) (1949). A result of *Stewart* is that the legislature is prohibited from enacting a local law regulating any police power matter in Baltimore City, except a local law either affecting the powers of the Police Commissioner, or governing a matter of state concern. See BALTIMORE CITY CHARTER § 6(24) (1949).

53. The General Assembly also could classify code counties based upon population or some other criterion, as Article XI-F permits, so that only one county meets the criterion of a particular class. Having placed just one county in the class, the General Assembly could then pass laws regulating the "incorporation, organization or government" of that single county. See text accompanying notes 35 & 36 *supra*.

ternal affairs of only one county. These are considered to be general, not local laws. This theory justifies the General Assembly in regulating the business of paper hangers in Baltimore City, liquor distribution in a single county, local eminent domain procedures, local fire prevention and control, local sewer services, and public health.<sup>54</sup> Often these measures will require the county to appropriate its own tax revenues to fund the service.

Local laws are nearly always passed if recommended favorably by a select committee dominated by the local delegation from the area to which the law would apply. Often the delegation consists of one senator and one delegate. This arrangement allows these local legislators an absolute veto over purely local enactments which are urgently needed by the county and ought to fall within the jurisdiction of those whom the voters have elected to govern the county. The great leverage thus given the legislator to exact political patronage from county officials is obvious. The major detriment, however, is that the citizen must look towards two governing bodies for his local needs and is unable to clearly fix the responsibility for necessary legislation upon either of them.

Another harmful effect of local legislation is that much of the General Assembly's time and attention is now devoted to its enactment. In fact, local laws applicable in their terms to one or to only a few counties accounted for more than fifty per cent of the work product of the Maryland legislature in each of the 1966, 1967 and 1968 sessions. Laws which applied to a single county in their effects, though not in their terms, accounted for an additional share of the legislature's work product in each of those years.<sup>55</sup> Consideration and passage of

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54. *E.g.*, *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1935) (holding a law authorizing Baltimore City to license paper hangers to be a general law and not a prohibited local law on the theories that the action authorized by the law might adversely affect state revenue and that the law was designed to permit the city to exclude non-residents from acting as paper hangers; the law was held unconstitutional on other grounds); *Norris v. Mayor & City Council*, 172 Md. 667, 192 A. 531 (1937) (held a law requiring the use of voting machines only in Baltimore City to be a general and not a local law, because it regulated the way in which residents of the city might exercise rights affecting the entire state); *Gaither v. Jackson*, 147 Md. 655, 128 A. 769 (1925). *But see* *State v. Stewart*, 152 Md. 419, 137 A. 39 (1927), which held invalid an act of the General Assembly empowering the police commissioner to promulgate traffic regulations because this was included among the express powers granted to the Mayor and City Council pursuant to Article XI-A, and accordingly the act was a local law prohibited by the Home Rule Amendment. *See also* *Grossfield v. Baughman*, 148 Md. 330, 129 A. 370 (1925) (court validated a law which prohibited the transfer of title to any motor vehicle owned in Baltimore City unless certain taxes were paid); 1 C. ANTIEAU, *MUNICIPAL CORPORATIONS* §§ 3.12-3.16, at 131-142, §§ 3.17-3.36, at 142-164.12 (1968).

55. RATCHFORD, *ANALYSIS OF LOCAL LEGISLATION ENACTED AT THE 1966 AND 1967 SESSIONS OF THE GENERAL ASSEMBLY OF MARYLAND* 1 (Md. County Comm'r's Ass'n, 1967); RATCHFORD, *ANALYSIS OF LOCAL LEGISLATION ENACTED AT THE 1968 SESSION OF THE GENERAL ASSEMBLY OF MARYLAND* 1 (Md. Ass'n of Counties, 1968). *See also* Committee Memorandum No. LG-1, *supra* note 4, at 39-47; *LOCAL LEGISLATION IN MARYLAND*, *supra* note 2, at 1. Direct comparisons are difficult because the various studies used different tests of "public local law" and because no accurate analysis has been made to determine if a law, general in its specific terms, nevertheless was local in its effects because the subject of the law prevailed in just one county when it was enacted. Laws which either were "local" (in the sense that by their terms they applied to one or a few units of local government), or were special in their terms, made up at least the following percentages of the total laws passed in the years indi-

local bills consumes the time of the entire legislature, even though the interests of only one county may be involved. Each local delegation spends many hours considering local bills which more properly should be enacted by the local county government. Local legislation also imposes unnecessary paper work on General Assembly draftsmen and other personnel. Finally, this arrangement encourages logrolling among legislators to obtain passage of their own local bills.

#### IV. SHARED POWERS HOME RULE FOR COUNTIES

The proposed new Constitution of Maryland, rejected by Maryland voters in May of 1968, would have required all counties to have home rule county governments operating under charters by 1971.<sup>56</sup> The proposed Local Government Article also provided that when mandatory home rule was in effect, with certain exceptions, a county could exercise any power or perform any function not denied by other sections of the Constitution, by the county's instrument of government or by a law passed by the General Assembly.<sup>57</sup>

cated: 1902 — 80%; 1939 — 67%; 1943 — 60%; 1951 — 70%; 1953 — 77%; 1966 — 55%; 1967 — 52%; 1968 — 50.5%. See note 41 *supra*.

56. PROPOSED MD. CONST. §§ 7.02, 37 (1968). The term "instrument of government" was used to mean "charter." Each county was to draft a charter and submit it to the county voters pursuant to a choice of procedures prescribed by the General Assembly. However, existing county charters could remain in effect without reenactment. The Schedule of Legislation proposed along with the Constitution set forth a simplified procedure for drafting a charter. PROPOSED MD. CONST., SCHEDULE OF LEGISLATION § 28 (1968). A sample charter prepared by the General Assembly prior to July 1, 1970, would automatically have become effective on January 6, 1971, for each county, the voters of which had not by July 1, 1970, approved a charter drafted by a county charter board. All county charters were made subject to amendment, which might be proposed by the county governing body or by petition of the voters, and was subject to the approval of a majority of those voting on the question at referendum. PROPOSED MD. CONST. § 7.03 (1968).

57. PROPOSED MD. CONST. § 7.04 (1968), provided:

Section 7.04. *Powers of Counties.*

A county may exercise any power, other than the judicial power, or perform any function unless that power or function has been denied to the county by this Constitution or by its instrument of government, or has been transferred exclusively to another governmental unit, or has been denied to the county by the General Assembly by law. A county may exercise only those taxing powers granted to it by the General Assembly by law but shall retain taxing powers granted to it prior to the effective date of this Constitution, unless any of those powers are subsequently denied to it by law.

Originally, this provision, in slightly different form, was reported out of the Local Government Committee as § 7.05. Committee Recommendation No. LG-1, at 3 (Md. Const. Conv. 1967). See also Committee Memorandum No. LG-1, *supra* note 4, at 5-6, 19-23. § 7.04, along with the provisions of § 3.22, General Applications of Laws (quoted note 59 *infra*), insofar as they related to counties, were not to become effective until January 6, 1971, unless simultaneously made effective for all counties by the General Assembly at an earlier date. PROPOSED MD. CONST. § 36 (1968). All other provisions of the new Constitution relating to local government were effective on July 1, 1968. PROPOSED MD. CONST. § 10.01 (1968). The reasons for the delay were, (i) to give the General Assembly the necessary time within which to review and to change the laws as might be necessary by reason of the two sections, and (ii) to delay the effective date of the two sections as applied to counties until such time as all counties had charters in effect. See TRANSCRIPTS OF DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION 13,148-49 (1968) [hereinafter cited as DEBATES]. Maryland, of course, has twenty-three counties, as well as Baltimore City, which is not a part of any county. The proposed Constitution provided that "County" as used in the document included Baltimore City. PROPOSED MD. CONST. § 7.01 (1968). As used in the proposed Constitution, "Municipal corporation" meant an incorporated city,

As a result of the shared powers provision, all those powers reserved to the states under the Constitution of the United States would have been shared with the counties and Baltimore City, other than those powers and functions excepted in accordance with the provision. The "shared powers" system contained in the proposed new Constitution provided simply that, subject to constitutional restrictions, these local governments could act freely within their geographical limits, in a manner similar to the General Assembly. Contrasting sharply with the method by which charter counties derive their powers under the present Constitution, the shared powers provisions would have reversed Dillon's Rule.<sup>58</sup> In this fashion, Maryland counties would have had ample powers of self-government, the first element necessary for effective home rule.

Shared powers home rule for counties would be meaningless if the General Assembly could continue its tradition of local legislation controlling matters of local concern which properly should be dealt with by laws enacted by the county governments. Accordingly, to assure the county governing bodies freedom to exercise these broad powers without undue interference from the General Assembly, the proposed Constitution sought to require the General Assembly to act only by general laws which would apply throughout the state in both terms and effects. Exceptions to this general law requirement were limited to those subjects on which the General Assembly could not act equally respecting all local units (*e.g.*, appropriations and regional matters), to state functions believed to be of such importance that no legislative restriction was desirable (*e.g.*, county taxing powers and education), to state agencies exercising a state and not a local function, and to the grant to certain counties of additional powers denied to other counties.<sup>59</sup>

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town, or village, but did not include Baltimore City, any county or other unit of local government. PROPOSED MD. CONST. § 7.05 (1968). These definitions were for constitutional and statutory purposes only, and were not intended to divest Maryland counties or multi-county agencies of the general attributes of municipal corporations. *See, e.g.*, 1 E. McQUILLEN, MUNICIPAL CORPORATIONS § 2.46 (1949); Pressman v. D'Alesandro, 211 Md. 50, 125 A.2d 35 (1956); Neuenschwander v. Washington Suburban Sanitary Comm'n, 187 Md. 67, 48 A.2d 593 (1946); Rescue Fire Co. v. County Comm'rs, 188 Md. 354, 52 A.2d 733 (1947).

58. Note 9 *supra*. Other attempts at reversing Dillon's Rule by directing that home rule provisions shall be liberally construed in favor of local units have not been entirely successful. *See, e.g.*, N.J. CONST. art. 4, § 7, cl. 11; Edward v. Moonachie, 3 N.J. 17, 68 A.2d 744 (1949). *Cf.* County of Essex v. Hindenlang, 35 N.J. Super. 479, 114 A.2d 461 (1955), *appeal dismissed*, 24 N.J. 517, 132 A.2d 807 (1957).

59. PROPOSED MD. CONST. § 3.22 (1968), provided:

Section 3.22. *General Application of Laws.*

The General Assembly shall enact no public laws except general laws which in their terms and effects apply throughout the State. No county shall be exempt from a public general law. The limitation of this section that the General Assembly shall enact only public general laws shall not apply to laws (1) pertaining to appropriations; (2) providing for or regulating the powers of departments, agencies, or instrumentalities of the State which perform a state and not a local function; (3) pertaining to public education; (4) pertaining to multi-county governmental units; (5) providing for the establishment, merger, or dissolution of counties or for the alteration of their boundaries; (6) granting, limiting, or withdrawing the taxing powers of a county or counties; or (7) empowering a county or counties, subject to any standards that the General Assembly may

The proposed requirement that the General Assembly act only by public general laws also represented a distinct change from the present constitutional arrangement for charter counties. First, the new provision eliminated the rule that a law applicable to two or more counties is not a local law, but a general law. Second, it substituted seven specific exceptions for the "state concern" test.<sup>60</sup>

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provide by law, to exercise any power or perform any function denied to other counties. This section shall not be construed to limit any power of the General Assembly, otherwise existing under this Constitution, to enact special laws, except that a special law shall not be enacted for any situation for which an existing general law is applicable.

The concept contained in all but the last sentence of this section originally was reported out of the Local Government Committee as § 7.06, General Application of Laws, providing as follows:

Except as otherwise provided in this Constitution and except with respect to appropriations and laws providing for and regulating the powers of departments, agencies or instrumentalities of the State performing a state and not a local function, the General Assembly shall enact no public local laws and shall enact only public general laws, which are defined as laws which in their terms and effects apply throughout the State. The General Assembly may nevertheless enable any county or counties to exercise any power or perform any function denied to other counties, subject to such standards as the General Assembly may prescribe. No county shall be exempt from a public general law.

Committee Recommendation No. LG-1, *supra* note 57, at 3. See also Committee Memorandum No. LG-1, *supra* note 4, at 6-7, 24-28. The last sentence was reported out of the Committee on the Legislative Branch, Committee Recommendation No. LB-2, at 5 (Md. Const. Conv. 1967). See also Committee Memorandum No. LB-2, at 18 (Md. Const. Conv. 1967); Committee Report No. S & D 16 (Md. Const. Conv. 1967). § 3.22 provided that the public general law requirement should not apply to a law, . . . (7) empowering a county or counties, subject to any standards that the General Assembly may provide by law, to exercise any power or perform any function denied to other counties." The main purpose of this clause was to permit the General Assembly to differentiate between the powers of rural counties and the powers of urban counties. For instance, the General Assembly might not wish to make available to smaller counties the broad police and taxing powers of Baltimore City. This provision was not intended to permit evasion of the general law requirement through a general denial of a power or function to all counties and a grant back to all but one or a few counties, thus resulting in a public local law of positive effect within the county or counties denied the power. See Committee Memorandum No. LG-1, *supra* note 4, at 26-28; e.g., DEBATES 3044-47; Marbury, Memorandum to Local Government Committee on Proposed Amendment to Section 7.09 [3.22] (LG Documents, Md. Const. Conv. 1968). Exception (7) was intended solely to permit the General Assembly to authorize the local county governing body to act, if it desired to act to exercise the power. But if the local governing body chose not to act, then the right to exercise the power was not to be operative, and the provisions of the particular general law would have remained applicable. For instance, if Baltimore City wished to enact a rent escrow ordinance, the General Assembly could have authorized this under exception (7), notwithstanding the statewide landlord-tenant law permitting eviction for nonpayment of rent now contained in MD. ANN. CODE art. 53, §§ 9-39A (1968). Chapter 459 of the Laws of 1968 provided by public local law for a rent escrow arrangement in Baltimore City. Under the proposed Constitution this would have been done by enabling law and then by the passage of a city ordinance. See also *Heubeck v. Mayor & City Council*, 205 Md. 203, 107 A.2d 99 (1954), holding a city rent control ordinance invalid because it permitted a tenant to hold over notwithstanding the expiration of the term of his lease and was in conflict with a public general law, MD. ANN. CODE art. 53, §§ 1-8 (1968), allowing the landlord to evict upon expiration of the lease. A specific enabling law by the General Assembly would have made this ordinance valid, under either the present or the proposed Constitution. It is clear that, as with the present Constitution, so with the proposed one, the courts would have had the power to declare acts of the legislature unconstitutional. E.g., *Hillman v. Stockett*, 183 Md. 641, 39 A.2d 803 (1944). This would have included the power to determine if a law is a special or local law in violation of § 3.22. E.g., *Brown v. State*, 23 Md. 503, 511 (1865). See also Everstine, *Legislative Process in Maryland*, 10 Md. L. REV. 91, 154-55 (1949).

60. See note 54 *supra*.

The proposed Constitution specifically excepted the judicial power from the powers allocated to the counties, because this was to have been vested exclusively in a unified state judicial system created in other parts of the Constitution.<sup>61</sup> The taxing powers of counties were also excluded from these broad powers and were continued as specific legislative grants. The existing taxing power of each county would have remained unchanged until enlarged or reduced by the General Assembly.<sup>62</sup> Other sections of the proposed Constitution further limited the powers shared by the counties. These limitations were to be effected by a combination of constitutional provision and legislative action. For instance, neither the powers nor boundaries of existing municipalities could have been changed by the county without either the consent of the municipal government or compliance with procedures established by the General Assembly.<sup>63</sup> The General Assembly would also have been given the authority to grant additional powers to municipalities by general law; only the General Assembly, by general law, could have withdrawn these additional powers.<sup>64</sup> In addition, the General Assembly would have been given the power to provide for multi-county governmental units. The exercise of this power was an exception to the general law requirement, so that the General Assembly might withdraw certain functions from the counties in a region and reassign these functions to a multi-county unit.<sup>65</sup>

The primary method of denying a county some power or function, however, would have been through a law of the General Assembly. Under Section 3.22, only a general law would have been effective to deny some county a power or function, unless the subject matter of the law fell within one of the seven listed exceptions to the requirement that all laws be of statewide application in both terms and effects.<sup>66</sup> This test would have applied to laws passed by the General Assembly before the effective date of Sections 7.04 and 3.22, as well as to those enacted afterwards. An existing local law of the General Assembly which denied a single county or Baltimore City some function, would have been subject to amendment by the local unit after the effective date of these provisions, unless it was a local law permitted under one of the seven exceptions in Section 3.22.<sup>67</sup> Nevertheless, the law would have remained effective until changed by the local unit in accordance with the provisions of its charter.<sup>68</sup> For example, the local law provid-

61. PROPOSED MD. CONST. § 5.01 (1968).

62. Note 57 *supra*. See also PROPOSED MD. CONST. § 6.02 (1968).

63. PROPOSED MD. CONST. §§ 3.22, 7.05 (1968).

64. PROPOSED MD. CONST. §§ 3.22, 7.04 (1968).

65. PROPOSED MD. CONST. §§ 3.02, 7.08 (1968).

66. Note 59 *supra*. DEBATES 11,125-27, 12,246-55. See also DEBATES 12,759-72.

67. See Committee Memorandum No. LG-1, *supra* note 4, at 19, 25-26; DEBATES, *supra* note 66. The interaction of §§ 7.04 (originally § 7.05) and 3.22 (originally § 7.06) became obscured by style and drafting changes. As reported out of the Local Government Committee, the provision on Powers of Counties expressly required the denial to be by "a public general law." This was changed to "law" as the provision passed through the styling procedure. Nevertheless, the intention remained that subject to the seven explicit exceptions in what finally became § 3.22, a denial must be by a general law. This requirement applied whether the law containing the denial was passed before or after the effective date of §§ 7.04 and 3.22.

68. PROPOSED MD. CONST. § 10.02 (1968).

ing for the Baltimore City Police Department<sup>69</sup> would have become subject to amendment by the Mayor and City Council. Many provisions of the state alcoholic beverage laws<sup>70</sup> and natural resource laws<sup>71</sup> would also have become subject to amendment by the counties, because these provisions consist of a series of local laws with variations from county to county and would not be within an exception to the general law requirement. One reason that the effective date of Sections 7.04 and 3.22 was postponed was to provide the General Assembly time to review such laws and to enact uniform general laws to the extent that state control of the particular subject matter ought be retained.<sup>72</sup>

On the other hand, local laws falling within one of the seven listed exceptions would have remained subject to amendment solely by the General Assembly. Examples include laws establishing local boards of education with variations as to their composition and mode of selection, laws creating such multi-county agencies as the Regional Planning Council, Washington Suburban Sanitary Commission and Metropolitan Transit Authority, laws providing for the Maryland Port Authority, which is a state agency, and laws which, unlike the alcoholic beverage laws, were not mandatory in their application to counties but merely authorized them to enact ordinances on subjects on which other counties were prohibited from legislating, such as the public accommodations law exception formerly applicable in Baltimore City.<sup>73</sup>

Thus, if an enactment of the General Assembly was either a general law or within an exception specified in Section 3.22, it might have operated to deny a particular power or function to one or more counties. A determination of whether the law *did in fact* deny counties the legislative power over the subject matter would depend on the legislature's intention in this regard.<sup>74</sup> The same question of legislative intent must be answered under the present Constitution where a county passes a law on a subject which, either before or after the local enactment, is the subject of a law of the General Assembly.<sup>75</sup>

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69. Ch. 203, [1966] Md. Laws 422. A charter amendment would also have been required. See BALTIMORE CITY CHARTER § 6(24) (1949).

70. MD. ANN. CODE art. 2B (1957 & Supp. 1967).

71. MD. ANN. CODE art. 66C (1967 & Supp. 1967).

72. See PROPOSED MD. CONST., TRANSITIONAL PROVISIONS § 36 (1968); Analysis of the Effect of Making § 7.05 [§ 7.04] and § 7.06 [§ 3.22] Effective for All Counties (1968 Md. Const. Conv., Memorandum, LG Committee to Ad Hoc Committee, Dec. 18, 1967). Compare DEBATES 13, 148-49.

73. MD. ANN. CODE art. 27, § 577 (1967). See, however, MD. ANN. CODE art. 49B, § 11 (1968).

74. DEBATES 3030-34, 3070-72, 3090-91, 3130-32, 3139-40, 11,157-62.

75. Where a local law enacted by the local unit directly conflicts with a general law, the general law prevails. MD. CONST. art. XI-A, § 3. But where a local law enacted by the General Assembly conflicts with a general law, the local law prevails. MD. ANN. CODE art. 1, § 13 (1968). This Code provision does not remove local laws passed by the General Assembly from the normal rule of statutory construction that a subsequent law, even though it is a general law, will prevail over an earlier law, if the General Assembly either expressly or by necessary implication indicates that the new law is in substitution of the prior local law. See, e.g., *Hitchins v. Mayor & City Council*, 208 Md. 134, 117 A.2d 854 (1955); *Alexander v. Mayor & City Council*, 53 Md. 100 (1880); *State v. Falkenham*, 73 Md. 463, 21 A. 370 (1891); *Green v. State*, 170 Md. 134, 183 A. 526 (1936); *Hill v. State*, 174 Md. 137, 197 A. 795 (1938). Cf. *Kirkwood v. Provident Savings Bank*, 205 Md. 48, 106 A.2d 103 (1954). Usually

Under the proposed Constitution, it was intended that the legislative denial of county power might occur only through a positive denial or by clear implication. This is consistent with the shared powers theory of home rule which is designed to substantially increase county powers. An example of methods whereby the General Assembly would have clearly denied or limited the powers of counties is the following:<sup>76</sup> the General Assembly might expressly exclude county power to legislate on the subject by providing, for example, "No county shall enact local laws or ordinances pertaining to the sale of alcoholic beverages." Even without such an express denial, clearly inconsistent provisions would operate as a denial by implication. This would occur where the county law either permitted something which state law expressly prohibited or prohibited something which the state law expressly permitted; for example, if a county law permitted the practice of dentistry by a corporation it would be invalid because it would conflict with a state law prohibiting a corporation from engaging in that activity.<sup>77</sup> Of course, infinite degrees of inconsistency can be imagined.

More difficult issues would arise where the county law is not inconsistent with specific provisions of a state law, but may be inconsistent with an intention of the state legislature to reserve to itself the exclusive right to legislate on the entire subject matter. An example is the comprehensive Uniform Commercial Code, which the General Assembly clearly intended to apply uniformly statewide.<sup>78</sup> Undoubtedly this would be construed by the courts to occupy the entire field of commercial transactions to the exclusion of county laws on the subject, even where such laws were not clearly inconsistent with any specific provision of the Uniform Commercial Code.

However, under the proposed system, a county law could not be invalidated by implying an intention on the part of the legislature to pre-empt the field, where no such intention was clearly expressed. The effect of applying pre-emption in this way would be to continue the restraints of Dillon's Rule on a somewhat more limited basis. Thus, a county law setting a higher minimum wage would not be declared

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where the General Assembly confers on a county the power to act on a specified subject, the county may pass laws directly in conflict with provisions of general laws existing at the time of the grant of power to the county. But where the general law is enacted after the power has been granted to the county, then the county's power to act normally is held to have been superseded, and a county ordinance on the subject is invalid. *See, e.g.,* Heubeck v. Mayor & City Council, 205 Md. 203, 107 A.2d 99 (1954); Kimball-Tyler Co. v. Mayor & City Council, 214 Md. 86, 143 A.2d 433 (1957); Herman v. Baltimore, 189 Md. 191, 55 A.2d 491 (1947). *See also* note 79 *infra*.

76. A more detailed analysis appears in Ruud, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 Tex. L. Rev. 682, 697-720 (1959). Texas courts apparently limit municipal powers more stringently than Maryland courts, even though the Texas courts have applied a form of shared powers approach to municipal home rule, and Maryland does not have shared powers home rule. *See* note 87 *infra*. Texas courts accomplish this greater limitation by holding local ordinances invalid by implying a legislative intention to pre-empt the field. Ruud, *supra*. *See* note 80 *infra* and accompanying text.

77. *See* Backus v. County Bd. of Appeals, 224 Md. 28, 166 A.2d 241 (1960).

78. MD. ANN. CODE art. 95B, § 1-104 (1964).



invalid where a state law requires a lower minimum wage to be paid.<sup>79</sup> Since the county law would not directly conflict with the state minimum wage requirement, the county would be free to deal with its local labor problems. One of these problems might be a higher cost of living, a factor which would justify a higher minimum wage. This is particularly true where the state legislature could easily have specifically denied counties the power to legislate minimum wages, had that been the

79. *E.g.*, *Wholesale Laundry Bd. of Trade, Inc. v. New York State Restaurant Ass'n*, 17 App. Div. 2d 327, 234 N.Y.S.2d 862, *aff'd*, 12 N.Y.2d 998, 189 N.E.2d 623, 239 N.Y.S.2d 128 (1963), held a city minimum wage law invalid because the state minimum wage law, which established a lower minimum, occupied the field on the subject. This result was not changed by a later amendment to the New York Constitution. *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 252 N.Y.S.2d 502 (1964). A recent Maryland *visi prius* case followed the two New York decisions and invalidated the Baltimore City minimum wage ordinance mainly because it provided a higher minimum wage than that required by the state minimum wage law. *Firey v. Mayor & City Council*, No. 49611A (Cir. Ct. Balto. City), Nos. 52-54 (Balto. City Ct.), No. 111550 (Sup. Ct. Balto. City) (all consolidated, opinion filed September 26, 1968, Sklar, J.). The Maryland Court of Appeals will invalidate a local enactment which clearly conflicts with a general law. Thus, in *Heubeck v. Mayor & City Council*, 205 Md. 203, 107 A.2d 99 (1954), the city rent control law was invalidated because it permitted a tenant to hold over and therefore directly conflicted with the state landlord and tenant law expressly permitting the landlord to evict him; and in *Levering v. Park Comm'rs*, 134 Md. 48, 106 A. 176 (1919), a city ordinance permitting sports to be played by professionals on Sunday was invalidated because a state law specifically prohibited all forms of bodily labor on Sunday, and this included the sports in question. *Mayor & City Council v. Stuyvesant Ins. Co.*, 226 Md. 379, 174 A.2d 153 (1961), invalidated that part of the city bail bond ordinance which required insurance companies licensed under the general insurance laws to obtain an additional license to write bail bonds in Baltimore City, because the state insurance code both specifically required courts to accept bonds written by state-licensed insurers, and specifically prohibited any local unit from requiring such an insurance company to obtain an additional license to transact business within the locality. But the rest of the bail bond ordinance was held valid insofar as it imposed additional regulatory and penal burdens upon state-licensed insurers. In this respect, the *Stuyvesant* court followed *Billig v. State*, 157 Md. 185, 145 A. 492 (1929), permitting the city to regulate strictly the times, places and other factors of certain sales by state-licensed auctioneers. Also, in *American Nat'l Bldg. & Loan Ass'n v. Mayor & City Council*, 245 Md. 23, 224 A.2d 883 (1962), the right of the city to tax savings and loan associations was upheld against an attack that the measure conflicted with the state's savings and loan law comprehensively regulating this industry. In *Billig*, the state law was to be a tax measure, and the city ordinance, a regulatory ordinance. The reverse was said to be true of the measures involved in *American National*. But in *Stuyvesant*, both measures clearly were regulatory, and the revenue aspects of both the ordinance and the state law were secondary. See also *Eastern Tar Products Corp. v. State Tax Comm'n*, 176 Md. 290, 4 A.2d 462 (1939) (validating additional local requirements which a company must follow to obtain the manufacturers' tax exemption authorized by state law); *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909) (holding that the city by ordinance could create narcotics offenses additional to those provided by state law and could provide higher penalties than those provided by the state for the same offenses, but also holding that the city had no power under its charter to forfeit the license of a pharmacist who violated the ordinance). No Maryland case has invalidated a local ordinance as conflicting with a state law because the local ordinance prohibited an activity permitted by the state, except where the state law expressly permitted the activity. *Heubeck* and *Stuyvesant* involved such an express permission in a state law with which the local ordinance prohibiting the action conflicted; therefore the Court of Appeals held invalid the conflicting ordinance. The *Firey* decision thus goes further in striking down a local regulatory ordinance than any decision of the Court of Appeals. Moreover, the city ordinance does not conflict with the state law, because the ordinance seeks to accomplish precisely the same purpose as does the state law, namely, to prohibit the payment of substandard wages. The higher cost of living and more severe substandard housing problems in the city justify additional city regulations by setting a higher minimum wage, in the same way as additional limitations were permitted in *Stuyvesant*, *Billig* and *Rossberg* on the basis that the state and city might act concurrently on the subject matter. See *American National*, *supra*; note 49 *supra*.

legislative intention. Of course, even more remote conflicts between state laws and county enactments would not operate to invalidate the county law under a shared powers arrangement. For instance, a county law making it a crime to resort to a rented room for immoral purposes would not be invalidated merely because state law controls other sexual offenses, such as prostitution and carnal knowledge.<sup>80</sup>

None of these problems can be completely eliminated by constitutional drafting. They are, however, among the more important issues which future draftsmen should attempt to resolve.<sup>81</sup>

Shared powers home rule for local governments is not a radically new concept even in Maryland. As previously discussed, Baltimore City has exercised broad police powers for over seventy years and

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80. See *In re Lane*, 367 P.2d 673, 18 Cal. Rptr. 33 (1961). *Contra*, *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909). Exemplified by recent decisions of the Supreme Court, pre-emption is applied on the federal level to invalidate a state law, even though it does not conflict with federal law, when both a federal and state law cover the same subject. For instance, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), reversed a conviction under a state law for sedition against the United States, because the federal laws dealing with loyalty problems occupied the entire field. Pre-emption of state laws by federal laws has been severely criticized. *E.g.*, Davis, *Constitutional Law: The States and the Supreme Court*, 45 A.B.A.J. 233, 233-35 (1959); Wham & Merrill, *Federal Pre-emption: How to Protect the State's Jurisdiction*, 43 A.B.A.J. 131 (1957). For discussions and criticisms of pre-emption by implication when applied to invalidate ordinances of local units, see 1 C. ANTIEAU, *supra* note 4, § 5.38, at 292.31; Allen & Sawyer, *The California City versus Preemption by Implication*, 17 HASTINGS L.J. 603 (1966); Note, *Municipal Corporations: Validity of Greater Fine Than Minimum for Failure to Respond Promptly to Traffic Tickets*, 14 OKLA. L. REV. 543 (1961); Note, *Municipal Corporations: Ordinances in Conflict with General Laws: Preemption by State of Field of Regulating Criminal Aspects of Sexual Activity*, 10 U.C.L.A. L. REV. 440 (1963); Lawrence & Cook, *Pre-emption by State Over Penal Ordinances*, 38 N.D.L. REV. 509 (1962); Note, *Municipal Corporations: Ordinance Invalid Where State Legislature Has Pre-Empted the Field*, 50 CALIF. L. REV. 740 (1962); BROMAGE, HOME RULE: PROGRESS OR REGRESSION 4, 6 (Ohio Cities and Villages, 1965). The rule as applied at the state-local level means that the mere existence of a single statute in a general field precludes local legislation on some specific subject in the field if the court finds, without any legislative expression, that the legislature intended to establish a basic policy or scheme. Carried to this extreme, pre-emption would place units of local government in a vice and render worthless any form of home rule, including shared powers home rule. Probably the best arrangement is that developed in Maryland. See note 49 *supra* and accompanying text and note 79 *supra*.

81. The Maryland Convention was not wholly successful in this respect. For instance, the judicial application of the pre-emption doctrine to the extent applied in *Pennsylvania v. Nelson*, 357 U.S. 497 (1956) or *In re Lane*, 367 P.2d 673, 18 Cal. Rptr. 33 (1961), might have been forestalled more emphatically by adding the phrase "clearly or by necessary implication" after the word "denied" where it twice appears in the first sentence of § 7.04, quoted note 57 *supra*. Moreover, the phrase, "or has been transferred exclusively to another governmental unit" probably is redundant and confusing. It was necessary under an earlier version of § 3.22, quoted note 59 *supra*, but the inclusion of § 3.22(4) and the metamorphosis of the general law provision as the Convention progressed should have resulted also in the deletion of this provision of § 7.04. Also, in § 3.22, the provision that the general law requirement "... shall not apply to laws . . . (2) providing for or regulating the powers of departments, agencies, or instrumentalities of the State which perform a state and not a local function," is unnecessarily broad and might have led to a continuation of harmful local legislation. Designed to permit laws pertaining to such agencies as the Maryland Port Authority, it might have been construed to permit the General Assembly to create sheriffs in some counties, but not others, to vary the composition of agencies such as liquor boards from county to county, and to pass other local bills of a type which the Convention intended the proposed Constitution should prohibit. State agencies could have been provided for by general law, and the Port Authority and other state agencies operating regionally could have been provided for under exception (4), since they are multi-county governmental units.

a form of shared taxing powers for over twenty years.<sup>82</sup> In essence, a constitutional system of shared powers will do no more than provide for all counties the broad powers of self-government already exercised by Baltimore City under its power to legislate concurrently with the state.<sup>83</sup> Units of local government in other states also exercise shared powers home rule. It is provided for cities and boroughs in the Alaska Constitution,<sup>84</sup> for home rule municipalities under the 1968 Pennsylvania constitutional amendments,<sup>85</sup> for South Dakota home rule municipalities under a recent amendment to the constitution of that state,<sup>86</sup> and for Texas municipalities under the Texas Constitution as

82. Note 18 *supra* and accompanying text. Baltimore City not only has been given "... the power to tax to the same extent as the State has or could exercise said power within the limits of said City as part of its general taxing power," Ch. 1, [1945 Sp. Sess.] Md. Laws 3, now appearing at BALTIMORE CITY CHARTER § 6 (33A) (1949), but also as previously discussed, has a broad grant of the police power. See BALTIMORE CITY CHARTER § 6(24) (1949), interpreted, *e.g.*, in *United Railways & Electric Co. v. State Roads Comm'n*, 123 Md. 561, 91 A. 552 (1914); *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909). In *Herman v. Mayor & City Council*, 189 Md. 191, 55 A.2d 491 (1947), a city ordinance taxing whiskey was upheld pursuant to the authority of the 1945 Act, despite a prior general law prohibiting any unit of local government from taxing whiskey, because the Act had repealed the general law *pro tanto*.

83. See note 49 *supra* and accompanying text and note 79 *supra*.

84. ALAS. CONST. art. X, § 11. See also *Lien v. Ketchikan*, 383 P.2d 721 (Alas. 1963); ALAS. CONST. art. X, § 1. Like the proposed Maryland Constitution, the Alaska Constitution provides taxing power for units of local government by express grant. ALAS. CONST. art. X, § 2. Compare PROPOSED MD. CONST. §§ 6.02, 7.04 (1968). See also J. BEBOUT, LOCAL GOVERNMENT UNDER THE ALASKA CONSTITUTION 9-12 (Public Administrative Services 1959). However, Alaskan home rule units are limited in legislating on matters of state concern. This results from the inclusion in § 6 of the Alaska Local Government Article of the language from the National Municipal League draft, quoted note 90 *infra*, which excludes from home rule shared powers "... the power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power, ..." BEBOUT, *supra* at 11. This appears to limit one of the major benefits of shared powers home rule, because a court may be called upon to determine whether a local ordinance involves a matter of "civil law" governing civil relationships, and if so, whether it is incidental to an "independent municipal power." This problem does not exist under the present Maryland Constitution where the local unit has a broad grant of power. See note 49 *supra* and accompanying text and note 79 *supra*.

85. PA. CONST. art. IX, § 2, in part provides: "... A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time." The Pennsylvania Constitution also limits local legislation:

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:

2. Locating or changing county seats, erecting new counties or changing county lines:

Nor shall the General Assembly enact any special or local law by partial repeal of a general law; but laws repealing local or special acts may be passed. PA. CONST. art. III, § 32, as ratified May 5, 1967. See 1 PURDON'S PA. LEG. SERVICE 29 (1967). Compare MODEL STATE CONSTITUTION, *infra* note 90, § 411, at 55-57.

86. S.D. CONST. art. X, § 5. This is the same shared powers provision as that recommended by the American Municipal Association. See FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6, at 19 (Home Rule Committee, American Municipal Ass'n, 1953).

construed by the courts.<sup>87</sup> Massachusetts cities and towns share the state's legislative powers as a result of the 1966 home rule amendment and legislation implementing it.<sup>88</sup> Shared powers home rule was also provided for cities and towns in the recently defeated proposed Constitution of Rhode Island.<sup>89</sup> The shared powers approach is recommended

87. See TEX. CONST. art. IX, § 3(2). *Dallas County Water Control & Improvement Dist. v. City of Dallas*, 149 Tex. 362, 366, 233 S.W.2d 291, 293 (1950), *cert. denied*, 340 U.S. 952 (1951):

The delegation of power involved in this case is not unconstitutional, because under the construction of the Home Rule Amendment approved by this court, there is authority in the Constitution itself for the exercise of this legislative power by home rule cities. It seems evident that one object of the adoption of the Home Rule Amendment was to empower home rule cities to exercise legislative powers theretofore exercised by the legislature, subject to limitations which the legislature might impose by general law.

The effect of this and cases like it is described in Ruud, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEX. L. REV. 682, 686 (1959):

In general, then, the Texas home rule cities need not await legislative authorization before they may deal with the subject, but once the legislature has spoken on a subject the cities' action concerning that subject must be consistent with that taken by the legislature.

See also *City of El Paso v. State ex rel. Town of Ascarate*, 209 S.W.2d 989 (Tex. Civ. App. 1947); *Pitre v. Baker*, 111 S.W.2d 359, 361 (Tex. Civ. App. 1937); *City of Denton v. Denton Home Ice Co.*, 119 Tex. 193, 27 S.W.2d 119 (1930).

88. MASS. GEN. LAWS ANN. ch. 43B, § 13 (Supp. 1967), providing in part:

Any city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by Section 8 of Article LXXXIX of the Amendments to the Constitution and which is not denied, either expressly or by clear implication, to the city or town by its charter. . . .

This law was enacted to implement the Massachusetts Home Rule Amendment ratified November 8, 1966, and providing in part:

Sec. 2: Any city or town shall have the power to adopt or revise a charter or to amend its existing charter through procedures set forth in sections three and four. The provisions of any adopted or revised charter or any charter amendment shall not be inconsistent with the constitution or any laws enacted by the general court in conformity with the powers reserved to the general court by section eight . . .

Sec. 8: The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted . . . " (1) on petition of the voters or governing body of the city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute regional entities; (4) for incorporating or dissolving cities and towns as corporate entities, alteration of city or town boundaries and merger or consolidation.

MASS. CONST. art. LXXXIX, repealing and substituting new provisions in MASS. CONST. art. II, §§ 1-9. For a discussion of some of the problems in drafting legislation under the Massachusetts provisions and suggested solutions, see SPECIAL COMMISSION ON IMPLEMENTATION OF THE MUNICIPAL HOME RULE AMENDMENT TO THE STATE CONSTITUTION (Eighth Report, Senate No. 1547, Boston, 1967). This version of shared powers seems needlessly complex.

89. PROPOSED R.I. CONST. art. XI (1968), provided:

Section 1. Every city and town may exercise any legislative power or perform any function which is not denied to it by this constitution or by its charter; is not denied to cities and towns generally; is not contrary to or inconsistent with general laws now existing or hereafter enacted; does not contravene any general law preemptive by its own terms; and is within such limitations as the general assembly may establish by general law, but no such act of the general assembly shall affect the form of government of any city or town. This grant of power does not include the power to enact private or civil law governing civil relationships, except as incident to the exercise of an independent municipal power, nor does it include the power to define or provide for the punishment of a felony.

The entire constitution was defeated at a special election held in April, 1968.

by the National Municipal League in its Model State Constitution and by many experts in the field of government.<sup>90</sup>

Many of the benefits of a shared powers arrangement would also result from the adoption of *any* form of constitutional home rule in all Maryland counties. However, the shared powers and general legislation provisions of the proposed new Maryland Constitution would have provided county governments with broader powers and protections from unwarranted legislative interference than either code or charter home rule under the present Constitution. A number of specific benefits would result from such an arrangement.

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90. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th ed. 1963), § 8.02, at 96-98, provides:

Section 8.02. *Powers of Counties and Cities.* A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, or to counties or cities of its class, and is within such limitations as the legislature may establish by general law. This grant of home rule powers shall not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent county or city power, nor shall it include power to define and provide for the punishment of a felony.

The meaning and advantages are explained in the comments:

Section 8.02 enables a county or city to exercise *any* legislative power or perform *any* function of government which is not specifically denied in its charter, or denied to all counties or cities or classes thereof, by general law. This grant of home rule power reverses the traditional constitutional stance regarding the exercise of local power by permitting the home rule civil divisions to exercise any power not specifically denied them rather than be restricted, as in the traditional approach, to the use of only those powers granted to them by the constitution or in the statutes.

This endows counties and cities, directly through the constitution, with all the lawmaking power of the state legislature (except as limited in the last sentence of the section) but, in recognition of state responsibility, permits the legislature to deny localities powers by general act. In this way Dillon's Rule (the narrow construction of the powers of local government) is reversed, for the presumption in the judicial interpretation of the AMA approach would have to be that the county or city has the power to act unless the power has been specifically denied.

Proponents of this plan point out that, in expanding home rule for local governments, it is easier to block a legislature from denying a power than it is to secure from a legislature the authority to perform an additional function of government.

The new approach also does away with the thorny question of whether or not the local government is acting on a matter amenable to local law and thus within the permissive functional framework of home rule powers under the traditional plan. In the new plan, this issue is no longer relevant and thus hazardous judicial interpretation is avoided. Under section 8.02 it is clear that the home rule locality can act on *any* matter, limited by its territorial jurisdiction, so long as it is not specifically denied the power by general law or by its charter.

As the issue of whether or not a matter is one of local concern (increasingly difficult to ascertain in the current urban age) is not central to the AMA plan, proponents believe that counties and cities may be stimulated into using greater initiative in the best tradition of home rule, since they will be free to presume they have the power to act.

*Id.* at 97. But cf. J. BEBOUT, *supra* note 84. The principal author of the shared powers approach is Dean Jefferson B. Fordham of the University of Pennsylvania Law School. See J. FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (American Municipal Ass'n, 1953). For Dean Fordham's views of its advantages, see Fordham, *Home Rule — AMA Model*, 44 NAT'L MUN. REV. 137 (1955). For a criticism of shared powers see Bromage, *Home Rule — NML Model*, 44 NAT'L MUN. REV. 132 (1955). Until 1963, the form of home rule provision advocated by Professor Bromage was the only recommendation of the National Municipal League. Now it is found as an alternate approach in MODEL STATE CONSTITUTION, *supra* at 99-100. It grants each city (but not any county) "... full power and authority to pass laws and ordinances relating to its local affairs, property and government; ..." and formerly was followed by a partial enumeration of powers which were not to be construed as

First, a shared powers system would encourage local initiative and responsibility. Under the present arrangement, if a county lacks the power to exercise some function, it cannot act unless it obtains special enabling legislation from the General Assembly. Unshackling county governments to permit them to act in all matters unless the General Assembly acts positively, visibly and generally to deny a function to all counties, will revitalize and stimulate county initiative. Through this approach, counties can more often provide their residents with the services they request without going through the often difficult process of obtaining specific legislative authorization. Given freedom to act in new functional areas, county officials will be unable to avoid their responsibility to enact necessary ordinances by claiming that they have no power to act and sending their citizens to the local legislative delegation to obtain special enabling legislation.<sup>91</sup>

Second, shared powers home rule is simpler than the existing structure. To determine now whether a county has the power to enact a law requires a review of the provisions and limitations of the express powers acts and special local enabling laws as well as the public general laws. The use of shared powers entirely eliminates the need for lengthy express powers acts and most local enabling laws because, under a shared powers system, the county presumptively can act on the matter unless denied the power, expressly or by necessary implication, by a gen-

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limiting the general grant. See Bromage, *supra*, at 134-35. See also BROMAGE, HOME RULE, PROGRESS OR RETROGRESSION 1, 5 (Ohio Cities and Villages, 1965). The use of the words, "affairs, property and government" has led to extensive and often inconsistent court interpretations. See, e.g., Richland, *Property, Affairs and Government*, in PROCEEDINGS, MUNICIPAL LAW SEMINAR 35-45 (N.Y. State Office for local Gov't, 1963), and the New York cases discussed therein. As Mr. Richland points out, "Unfortunately, those words have been so construed by the courts as to mean neither the property nor the affairs nor the government of municipalities, in the sense in which those words commonly are used." *Id.* at 36. See also TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, NEW YORK STATE, LOCAL GOVERNMENT 101-05, 105-06, 106-09 (Pamphlet 13, 1967) (arguments in favor of retention of the phrase, "property, affairs and government"; arguments against retention; analysis of the shared powers or Fordham approach). Shared powers county home rule was recommended by the Maryland Constitutional Convention Commission. REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION, *supra* note 3, at 258-59; see also *id.* at 245-46. For a further explanation and discussion of the Commission's recommendations in this regard, see TRANSCRIPT, THE CONFERENCE ON METROPOLITAN PROBLEMS 156-99, 309-12 (Goucher College, Dec. 9-10, 1966). This approach is also recommended by The Advisory Commission on Intergovernmental Relations for selected units of local government. STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL, AND PERSONNEL POWERS OF LOCAL GOVERNMENT, *supra* note 3, at 72-74; COMMITTEE ON GOVERNMENT OPERATIONS, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, UNSHACKLING LOCAL GOVERNMENT 27 (Twenty-Fourth Report, 1968). For other explanations of the advantages of shared powers, see Kresky, *Local Government*, in J. WHEELER, SALIENT ISSUES OF CONSTITUTIONAL REVISION 150, 156-58 (National Municipal League, 1961); Keith, *Sharing of Powers*, 56 NAT'L CIV. REV. 621 (1967); Keith, *Home Rule Texas Style*, 44 NAT'L MUN. REV. 184 (1955); Ylvisaker, *Some Criteria for a "Proper" Areal Division of Governmental Powers*, in MAASS, AREA AND POWER: A THEORY OF LOCAL GOVERNMENT 27 (1959), which analyzes shared powers at all governmental levels.

91. Of course, this would not be true where a general law denied a power or function to counties generally or under one of the exceptions. In such a case, the county government would require special enabling legislation before it could enact the desired county ordinance, as permitted by § 3.22(7). See note 59 *supra*.

eral law or by a permitted local law. As a result, legislative drafting and research will be vastly simplified.

Third, the private citizen is better able to fix responsibility for provision of local services under a shared powers arrangement. The present constitutional arrangement for county home rule requires the private citizen to look to two governing bodies, his county and the General Assembly, for the provision of services at the local level. This results in part from the inadequate powers of counties; the enactment of a local enabling law by the General Assembly to authorize the county to provide some new service is often necessary. It also results from the freedom of the General Assembly to enact local laws governing internal county affairs. Under the shared powers arrangement, the citizen will usually look to the county government and not to the General Assembly for the provision of local services, because county governments will have greater power to provide local services and also because the General Assembly will not be able to enact local legislation which would interfere with the internal government of one or just a few counties.

Fourth, a shared powers system requires the legislature to act more responsibly. Under a shared powers arrangement, the state legislature cannot usually prevent a county from passing some ordinance by merely failing to pass a special enabling act to give the county the power to legislate on the subject. The General Assembly must act *positively* to deny counties a certain power; otherwise they may exercise it.

Fifth, the legislature can devote more of its time to matters of statewide concern under shared powers, because there is much less local legislation. If all Maryland counties had shared powers home rule in 1968, about thirty-four per cent of the local laws which the General Assembly enacted could have been county ordinances.<sup>92</sup> This would have resulted from each county's broader powers and the consequent need for fewer special local enabling laws. Had the proposed Constitution been in effect, all of its provisions would have reduced by at least fifteen per cent the number of local laws enacted in 1968 by the General Assembly.<sup>93</sup> Under a shared powers system, the General Assembly would have been free of burdensome issues of purely local concern. Able to devote more time and initiative to matters of statewide concern, the legislators could set broad policy more effectively. Thus, when some function or part of a function, which was previously handled by the counties as a purely internal affair, became of statewide concern, the legislature could set broad policy by making it a matter of state control and concern.<sup>94</sup>

Sixth, a shared powers system requiring the General Assembly to act only by general laws would prevent legislative interference in internal county affairs based on the "state concern" theory. In Mary-

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92. RATCHFORD, 1968 ANALYSIS, *supra* note 55, at 1-2.

93. *Id.*

94. See note 55 *supra* and accompanying text.

land, despite the prohibition against legislative enactment of "local" legislation, laws relating to matters of statewide concern, but affecting only one county, are not usually considered to be local laws. However, the General Assembly is free to enact such a "general law," even though it applies only within a single home rule subdivision or has county-by-county variations.<sup>95</sup> Shared powers home rule, together with the general law requirement, prevents this type of interference with local government. Under a shared powers arrangement, a law singling out one county for special treatment, even on a matter alleged to be of statewide concern, would be invalid, unless it fell within one of those exceptions to the general law requirement recognized by the Constitution.

Finally, under a shared powers arrangement it is unnecessary to determine what are local and what are state functions, either through court decision or constitutional definition. It may seem easy to distinguish between matters of state concern and matters of local concern at a given point in time. This is precisely what an express powers arrangement, such as Article XI-A, seeks to do. However, a constitutional allocation of functions is inflexible. Courts may hold a matter to be of local concern when in fact it has become a matter of statewide concern since the issue first came before the courts, or *vice versa*. For instance, traffic control forty years ago was a matter of purely local concern but today has become less a local and more a state and national problem.

Moreover, in today's complex society, very few governmental functions can be allocated solely to one level of government. Functions cannot be designated as solely of state or local concern. Most functions more appropriately ought be performed at all governmental levels, because the problems involved do not stop at local boundaries and cannot be governed solely by local ordinances.<sup>96</sup> As an example, various aspects of the public health function, once purely a municipal matter, today are exercised by local, regional, state and national governments, and even internationally by the World Health Organization.

The shared powers approach is more flexible than the express powers scheme because it avoids any attempt to allocate powers to local units along functional lines. Such an allocation need not be made either in the Constitution or by the legislature in an express powers act. Moreover, court decisions as to what matters are of state concern are unnecessary. Shared powers permits the legislature to act by general law to allocate among governmental units specific functions which *at the time the particular law is passed* may be performed best by the governmental unit selected, whether it be state, multi-county or county.

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95. See note 54 *supra* and accompanying text.

96. Grodzins, *Why Decentralization by Order Won't Work*, in BANFIELD, *URBAN GOVERNMENT* 122 (1961). "The federal system is not accurately symbolized by a neat layer cake of three distinct and separate planes. A far more realistic symbol is that of a marble cake. Wherever you slice through it you find an inseparable mixture of differently colored ingredients." See also Ylvisaker, *supra* note 90, at 35; Lee, *Home Rule Appraised*, 51 NAT'L CIV. REV. 486 (1962).



## V. SUMMARY AND CONCLUSIONS

The governmental structure of Maryland would be strengthened by a constitutional amendment providing shared powers home rule for all Maryland counties and by a meaningful limitation on the enactment of local legislation by the General Assembly. The urgency of achieving these benefits cannot be overstated. The already rapid urbanization of suburban areas is accelerating. This is especially true in Maryland because of its location in the Boston-Washington corridor. The problems which Maryland and its counties will face in the future will resemble those with which Baltimore City is now struggling, increased many times over. Demands for such local services as water supply, garbage and sewage disposal, education, police protection, and parks and recreation will reach proportions never before equalled in this country. Although these demands will have to be met on a state or regional basis to some degree, the counties should be prepared to satisfy their local needs as efficiently and responsively as their more limited resources and geographic areas will allow. Shared powers home rule as described in this study would help prepare the state and county governments to meet this challenge.

However, these reforms will be difficult to achieve through the normal process, which requires the legislature to propose amendments to the Constitution by the affirmative vote of three-fifths of all members of each of the two houses before consideration by the voters.<sup>97</sup> This difficulty results partly from the fact that any increase in county power or limitation on local legislation will lessen the impact of the local delegate or senator on the county which elects him. The legislator will less often be able to claim credit for the local bill giving county citizens some desired service. He will no longer be able to bargain with county officials for local patronage to enhance his chances of reelection. Undoubtedly, this was one reason why the General Assembly failed to approve the amendments to the county home rule provisions recommended in 1952 by the Sobeloff-Stockbridge Commission.<sup>98</sup>

Some of the benefits which would result from complete constitutional revision of the local government provisions of the present Constitution also may be achieved by two simple expedients. First, the express powers act for charter counties should be amended by the General Assembly to grant to each charter county all of the state's police powers to be exercised within the county's geographic limits. Second, the Constitution should be amended to simplify the mechanics of adopting charter home rule.<sup>99</sup> The major benefits, however, cannot be achieved without a complete constitutional revision.

Viewing the results of the recent Maryland constitutional referendum, one might pessimistically conclude that complete constitutional revision of local government through the convention method is not

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97. MD. CONST. art. XIV, § 1.

98. See note 47 *supra*.

99. See note 19 *supra*.

feasible. This may not, however, be the case. The reasons for the defeat of the proposed Maryland Constitution are found outside the provisions establishing shared powers county home rule and limiting local legislation.<sup>100</sup> The fact that the proposed Maryland Constitution was voted on as a package caused people who opposed a single provision to vote against the entire document.<sup>101</sup> The Maryland experience makes it clear that complete constitutional revision submitted to the voters as a single issue is unwise, at least for the present. This conclusion is reinforced by the recent defeat of the more widely opposed new state constitutions in New York and Rhode Island. Had each article of these constitutions been voted on separately, some of the votes cast against the constitutions as a whole undoubtedly would have been cast in favor of many of the separate provisions. A piecemeal method was used for the successful referendum on revisions to the Florida Constitution in November, 1968. In this fashion, the new Pennsylvania Local Government Article containing shared powers home rule was voted on separately; it was adopted by a large majority of the popular vote.

Constitutional revision of local government, including shared powers home rule and a more effective limitation on local legislation, probably can best be achieved in Maryland through another popularly elected constitutional convention. The convention should be empowered to propose amendments to be voted on separately at one or more special elections at times set by the convention. It should be empowered to continue to deliberate for a period of time sufficient to propose revisions to all parts of the state Constitution in this fashion.<sup>102</sup> Thus, debate will be focused on the more limited issues of each proposed alteration. Each voter will be able to express his opposition to a single provision without also having to oppose a change he favors. The need to modernize our state and local governments is so great that the additional time and expense involved in this procedure certainly is justified.

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100. *Contra*, Booth, *The Adequacy of the Virginia Constitution of 1902*, 54 VA. L. REV. 981, 991-92 (1968). The most controversial feature of the local government provisions was the reference to popularly elected regional governments, not mandatory shared powers home rule, as Mr. Booth suggests.

101. Many other reasons have been advanced for the defeat of the new Maryland Constitution, including the widespread civil disorders in April, which closely preceded the constitutional referendum on May 14, 1968, and a failure to adequately inform the public about the contents of the new document. Pending the publication of a comprehensive analysis being prepared by Dr. John B. Wheeler of Hollins College, *see, e.g.*, Hanson, *Analysis*, CIV. J. July-Aug. 1968, at 38-40. *See also* Loevy, *Vote Analysis Made of Maryland Defeat*, 57 NAT'L CIV. REV. 519 (1968).

102. *Compare* J. WHEELER, *THE CONSTITUTIONAL CONVENTION: A MANUAL* 9-10 (National Municipal League, 1961). For some of the advantages and disadvantages of various methods of constitutional revision, particularly the convention procedure, *see* Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995 (1968). Of course, there are other ways which may be successful. For instance, a commission consisting of legislators and citizens might prepare amendments for approval by the General Assembly, as is being done in Virginia.